Petition

Office - Supreme Court, U.S.
FILED
SEP 24 1981
ALEXANDER L. STEVAS,
CLERK

81-594

No. —

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120; THE NEWSPAPER GUILD AFL-CIO, CLC; WILKES-BARRE PRINTING PRESSMEN'S AND ASSISTANT'S UNION; WILKES-BARRE STEREOTYPER'S AND ELECTROTYPER'S UNION, LOCAL 139; INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, AFL-CIO; WILKES-BARRE TYPOGRAPHICAL UNION, LOCAL 187; WILKES-BARRE COUNCIL OF NEWSPAPER UNIONS, INC.; BROWN, WILLIAM M.; ORCUTT, JAMES H.; SABATINI, RICHARD V.; MAURER, JOSEPH A., JR., WALLACE, JOHN J.; LADD, ROBERT; KAPORCH, JAMES; BOOTH, ROBERT,

Petitioners,

v.

WILKES-BARRE PUBLISHING CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WARREN J. BORISH
MERANZE, KATZ, SPEAR & WILDERMAN
1200 Lewis Tower Building
15th & Locust Streets
Philadelphia, PA 19102

DONALD F. SUGARMAN
MILLER, COHEN, MARTENS & SUGARMAN, P.C.
2460 First National Building
Detroit, MI 48226

DAVID BARR
BARR AND PEER
1899 L Street, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
202-637-5390
(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether § 301 of the Labor Management Relations Act, which provides in relevant part that "[s]uits for violation of contracts between an employer and a labor organization * * * in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties * * *," grants the federal courts the authority to formulate and to implement a federal common law of tortious interference with a labor contract.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
1. The Nature of the Case and the Allegations of the Pleadings	3
2. The Decisions Below	7
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page

Aacon Contracting Co. v. *Association of Catholic Trade Unionists*, 178 F. Supp. 129 (E.D.N.Y. 1959), affirmed 276 F.2d 959 (2d Cir. 1960) 16
Abrams v. *Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970), cert. denied sub nom. *United Steelworkers* v. *Abrams*, 401 U.S. 1009 ..... 9, 15, 16
Baker v. *Fleet Maintenance*, 409 F.2d 551, 554 (C.A. 7, 1969) 9
Beausoleil v. *United Furniture Workers*, 244 F. Supp. 719 (D. N.H. 1975) 7
Bowers v. *Ulpiano Casals, Inc.*, 393 F.2d 421 (C.A. 1, 1968) 9
Burlesque Artists Association v. *I. Hirst Enterprises, Inc.*, 134 F. Supp. 203 (E.D. Pa. 1955) .. 7
Carbon Fuel Co. v. *Mine Workers*, 444 U.S. 212 14
Curtis Bay Towing Co. v. *National Maritime Union*, 206 F. Supp. 741 (E.D. Pa. 1962) 7
Hitchmen Coal and Coke Co. v. *Mitchell*, 245 U.S. 229 15
Howard Johnson Co. v. *Hotel Employees*, 417 U.S. 249 15
Machinists v. *Wisconsin Emp. Rel. Comm'n.*, 427 U.S. 132 ..... 12, 13
Railroad Trainmen v. *Terminal Co.*, 394 U.S. 369 .. 15
San Diego Unions v. *Garmon*, 359 U.S. 236 12
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 ..... 9, 13
Vegelahn v. *Guntner*, 166 Mass. 92, 44 N.E. 1077 .. 15

STATUTES:

§ 8, National Labor Relations Act, 29 U.S.C. § 158 .. 11, 13
§ 301, Labor Management Relations Act, 29 U.S.C. § 185 ..... *passim*
§ 303, Labor Management Relations Act, 29 U.S.C. § 187 10

LEGISLATIVE MATERIALS:

H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 13
S. Rep. No. 105, 80th Cong., 1st Sess. 13, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120; THE NEWSPAPER GUILD AFL-CIO, CLC; WILKES-BARRE PRINTING PRESSMEN'S AND ASSISTANT'S UNION; WILKES-BARRE STEREOTYPER'S AND ELECTROTYPER'S UNION, LOCAL 139; INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, AFL-CIO; WILKES-BARRE TYPOGRAPHICAL UNION, LOCAL 187; WILKES-BARRE COUNCIL OF NEWSPAPER UNIONS, INC.; BROWN, WILLIAM M.; ORCUTT, JAMES H.; SABATINI, RICHARD V.; MAURER, JOSEPH A., JR., WALLACE, JOHN J.; LADD, ROBERT; KAPORCH, JAMES; BOOTH, ROBERT,

Petitioners,

v.

WILKES-BARRE PUBLISHING CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Newspaper Guild of Wilkes-Barre, Local 120, the Newspaper Guild AFL-CIO, CLC, Wilkes-Barre Printing Pressmen's and Assistant's Union, Wilkes-Barre Stereotyper's and Electrotyper's Union, Local 139, International Printing & Graphics Communications Union, AFL-CIO, Wilkes-Barre Typographical Union, Local 187, Wilkes-Barre Council of Newspaper Unions, Inc., William M. Brown, James H. Orcutt, Richard V. Sabatini, Joseph A. Maurer, Jr., John J. Wallace, Robert Ladd, James Kaporch, and Robert Booth respectfully petition for a writ of certiorari to review the judgment of the United

States Court of Appeals for the Third Circuit in *Wilkes-Barre Publishing Co.* v. *Newspaper Guild of Wilkes-Barre, etc., et al.*, C.A. 3 No. 80-299.

OPINIONS BELOW

The Court of Appeals' opinion and judgment in this case are reported at 647 F.2d 372 and are reprinted (together with that court's amendments thereto) at pp. 1a-29a of the separately bound appendix filed with this petition (and hereinafter cited as "Pet. App. ——"). The District Court's memorandum and order are reported at 504 F.Supp. 54 and are reprinted at Pet. App. 36a-80a.

JURISDICTION

The Court of Appeals' opinion and judgment in this case issued on April 1, 1981. That court denied petitions for rehearing on May 11, 1981 and May 15, 1981. (Pet. App. 30a-35a). Mr. Justice Brennan's order extending the time for filing this petion to and including September 24, 1981 is reprinted at Pet. App. 81a. This Court has jurisdiction to review the Court of Appeals' judgment pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

1. The Nature of the Case and the Allegations of the Pleadings.

The Court of Appeals fairly and succintly stated the parties to this case, its essential nature and the allegations of the pleadings; we therefore set out below that portion of the lower court's opinion with only minor omissions:

> Wilkes-Barre Publishing Company, (the Employer) a Pennsylvania corporation which publishes a daily newspaper, the *Times-Leader*, [filed a] three count complaint for declaratory and injunctive relif and compensatory and punitive damages. The defendants are the Newspaper Guild of Wilkes-Barre, Local 120 (the Local Guild), the Newspaper Guild (the International Guild), three newspaper trades local unions, and one newspaper trade international union, the Wilkes-Barre Council of Newspaper Unions, Inc. (the Council), a Pennsylvania corporation which publishes a daily newspaper, the *Citizens' Voice*, and eight individual residents of Pennsylvania each of whom is an official in one of the unions. The first count is brought pursuant to section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, for the alleged breach of a collective bargaining agreement between the Employer and the Local Guild. The second count charges that the International Guild breached the collective bargaining agreement or, alternatively, together with the newspaper trade unions, the eight individual defendants and the Council tortiously induced a breach of the Employer-Local Guild contract in violation of section 301. The third count is a pendent claim under Pennsylvania law for tortious interference with the Employer-Local Guild contractual relationship.
>
> * * * *

The Allegations of the Pleadings

Since 1938 the Employer has had a collective bargaining relationship with the Local Guild as representative of the editorial, advertising, circulation, business and maintenance employees. The [Oct. 3, 1976-Sept. 30, 1978] collective bargaining agreement contains a "Duration and Renewal" clause, Article XXV providing [*inter alia*]:

* * * *

> 2. At any time within sixty (60) days prior to the termination of this agreement, the Publisher or the [Local] Guild may initiate negotiations for a new agreement to take effect at the expiration of the present agreement. *The terms and conditions of this agreement shall remain in effect during such negotiations.* (emphasis supplied).

The collective bargaining agreement also contains Article XVII, providing:

> Employees of the Publisher shall be free to engage in any activities outside of working hours *provided such activities do not consist of service performed for publications in direct competition with the Publisher*, and provided further that, without permission, * * *. (emphasis supplied).

Finally, the collective bargaining agreement contains in Article XV (3) an arbitration clause * * *.

* * * *

On August 29, 1978, within sixty days of the September 30 expiration date of the contract, the Employer and the Local Guild commenced negotiations for a new agreement. Negotiations continued through October 5. During those negotiations, on September 28, the Employer's bargaining representatives delivered to the Local Guild bargaining representatives a letter stating the Employer's position that by virtue of Article XXV the collective

bargaining agreement continued in effect after September 30. Simultaneous negotiations were also taking place, with the assistance of the Federal Mediation and Conciliation Service, with the newspaper trade union locals representing production employees. The complaint does not allege that the production employees' collective bargaining agreements had a clause similar to Article XXV, but does allege that the Employer's position as to the automatic extension of the Local Guild contract was called to the attention of their representatives.

On October 6 the Local Guild and the production trades locals voted to strike. Prior to that time, and indeed prior to September 30, individual defendants John J. Wallace of the Local Guild, Robert Ladd of the Typographical Local, James Kaporch of the Pressmen's Local, and Robert Booth of the Stereotypers' Local caused the incorporation of the Council as a nonprofit corporation for the purpose of publishing a newspaper throughout the pendency of the labor dispute with the employer. For several weeks prior to the October 6 work stoppage, pre-incorporation organizational activities were undertaken for production and distribution of the *Citizens' Voice* and at a rally held on October 6 the publishing plans were announced. Publication and distribution began on October 9, utilizing editorial, advertising, circulation and building maintenance personnel represented by the Local Guild and on strike against the Employer. The production personnel are also striking employees of the Employer. Distribution of the *Citizens Voice* is to present and former *Times-Leader* subscribers, and advertising in it is solicited from *Times-Leader* advertisers.

On October 11, 1978 the Employer filed with the National Labor Relations Board a charge that by encouraging its employees to participate in the *Citizens' Voice* venture the Local Guild has committed the unfair labor practice of refusing to bargain in

good faith in violation of section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. § 158(b)(3). It later filed similar charges against the production trades locals.[1] The National Labor Relations Board has found the existence of reasonable cause to believe the alleged unfair labor practice has occurred.[2]

The Employer alleges that by virtue of Article XXV its collective bargaining agreement with the Local Guild, including the prohibition in Article XVII against competitive employment, continued in force after September 30, 1978. By working for the *Citizens' Voice*, the Employer contends, the Guild members violated their contract. And by inducing Guild members to breach the terms of an extant collective bargaining agreement the unions and individuals involved in the *Citizens' Voice* enterprise tortiously interfered with that contract.

All defendants filed motions to dismiss. Those motions are addressed primarily to the legal sufficiency of the complaint. In one respect, however, new matter is pleaded, and conceded by the Employer. On November 9, 1978 the Employer attempted to grieve the dispute over Guild members' working for the *Citizens' Voice*. The Local Guild took the position that the contract had terminated. The Employer then submitted the grievance to arbitration. The parties designated an arbitrator in accordance with the terms of the contract, but the

---

[1] The Employer contends that by creating a rival business enterprise while pretending to bargain collectively, the Local Guild and the production trades locals placed themselves in such a position of conflict of interest that their bargaining was not in good faith.

[2] Although the complaint does not so allege, the district court opinion discloses that the Board has stayed its unfair labor practice proceeding pending arbitration. The parties do not on appeal dispute that the Board has deferred to an arbitration forum.

> Local Guild expressly conditioned that designation on the understanding that it reserved the right to challenge arbitrability in a judicial forum for the reason that the contract, including the arbitration clause, had terminated. Before the arbitrator commenced a hearing, the Employer filed the instant lawsuit. The Local Guild objected, before the arbitrator, to proceeding before two tribunals, and the parties to the arbitration agreed to hold it in abeyance pending disposition of motions in the district court to dismiss the complaint. [Pet.App. 3a-8a; footnotes in original.]

2. The Decisions Below.

The District Court (Chief Judge William J. Nealon), acting in accord with the general understanding of the limits of § 301, granted the motion to dismiss count two of the complaint—the "§ 301-tortious interference with a labor contract" count—as failing to state a claim upon which relief could be granted, relying in essence on the reasoning in the following passage from *Curtis Bay Towing Co.* v. *National Maritime Union*, 206 F.Supp. 741, 743 (E.D. Pa., 1962):

> Section 301 enables unions to sue and be sued for violation of contract. The present plaintiffs have no contract with any of the defendants. * * * [The plaintiffs] allegations do not assert violation of a contract to which defendants are a party, but rather sound in tort for recovery for inducing breach of contract or interfering with business relationships.

Of the many decisions to the same effect the District Court cited *Beausoleil* v. *United Furniture Workers*, 244 F. Supp. 719, 720 (D. N.H. 1975); *Burlesque Artists Association* v. *I. Hirst Enterprises, Inc.*, 134 F. Supp. 203, 204 n.2 (E.D. Pa. 1955).

The Court of Appeals reversed, stating:

> In this case it is charged that a competitor of the Employer and the participating unions tortiously in-

duced the Employer's employees to breach their collective bargaining agreement. An essential element of the cause of action, whether injunctive relief or damages is sought, is a violation of the collective bargaining agreement. The relief sought is to recover for or prevent that violation. The label attached to the remedy as tort or contract is not dispositive of the scope of federal common law which under section 301(a) it is our responsibility to create.[6] A holding that tortious interference with a collective bargaining agreement is not a matter governed by federal law would leave open the possibility of lack of uniformity in scope of obligation which the Court in [*Teamsters Local v.*]*Lucas Flour* [*Co.*, 369 U.S. 95] sought to prevent, and which in *Nedd v. UMW*, 556 F.2d at 198, we said was undesirable. The claim of tortious interference with a labor contract * * * involves protection of a property interest —a labor contract—which has its being in and draws its vitality from the federal common law of labor contracts. We hold, therefore, that a claim of tortious interference with a labor contract is one arising under federal common law over which the district court has jurisdiction.

---

[6] *Contra* Curtis Bay Towing Co. of Pa. v. National Maritime Union, 206 F. Supp. 741, 743 (E.D. Pa. 1962); Wiggins v. Pan American World Airways, Inc., 83 L.C. ¶ 10,419, at 17,686. *But cf.* Abrams v. Carrier Corp., 434 F.2d 1234, 1253 (2d Cir. 1970), *cert. denied sub nom.* United Steelworkers v. Abrams, 401 U.S. 1009 (1971) (no federal 301 jurisdiction over claim of civil conspiracy to violate labor contract). In none of these cases did the court analyze the problem in terms of the need to enforce a collective bargaining agreement.

[Pet. App. 17a-19a; footnote in original.]

REASONS FOR GRANTING THE WRIT

1. Thirty-four years after § 301 of the Labor-Management Relations Act was enacted, and twenty-four years after issuance of the decision in *Textile Workers* v. *Lin-*

coln Mills, 353 U.S. 448, this Court's definitive statement on that provision's scope and meaning, the Court of Appeals has discovered in § 301 a far-reaching law making power never before discerned—the authority to fashion a federal common law of tortious interference with a labor contract.

The Third Circuit's decision in this regard is in conflict with the Second Circuit's conclusion that the claim of a conspiracy to induce a breach of a labor contract (the substance of which is indistinguishable from the claim here) is *not* made actionable by § 301 (see *Abrams* v. *Carrier Corp.*, 434 F.2d 1234 (C.A. 2, 1970) *cert. denied sub nom. United Steelworkers* v. *Abrams*, 401 U.S. 1009), and is irreconcilable with the position of the First and Seventh Circuits that a "section 301 suit fail[s] to state a claim * * * if the defendant [is] not a party to the collective bargaining agreement [which is] the basis for the plaintiffs' claim. (*Baker* v. *Fleet Maintenance*, 409 F.2d 551, 554 (C.A. 7, 1969); *Bowers* v. *Ulpiano Casals, Inc.*, 393 F.2d 421 (C.A. 1, 1968)).

Moreover, the radical expansion of § 301 worked by the decision below undermines the plan of the National Labor Relations Act as amended by the Labor-Management Relations Act—the statutes in which Congress embodied a series of *statutory* rights and obligations stated with specificity and enforceable primarily by the National Labor Relations Board, supplemented by a series of enforceable *contractual* rights and obligations created by management and labor through free collective bargaining. The NLRA and LMRA reflect a decision to supplant the then-existing judge-made labor law with a comprehensive *legislative* labor policy. There is not a hint in § 301's language or legislative history that what Congress consciously took away with one hand—the judicial authority to make substantive labor law—the legislature gave back by providing that the parties to labor contracts are to be bound by their contractual commitments.

Nevertheless, as the instant case shows, the Third Circuit's construction of § 301 provides the federal courts with a general mandate to police the economic weapons used in strikes and lockouts where in the courts' view those weapons improperly interfere with the enforcement of a labor contract. While § 301 has a large purpose—holding the parties to labor contracts to their promises—it is one that does not grant the courts a wide discretion to create the rights and duties that govern the conduct of labor disputes.

Thus, the novel decision below will inevitably breed litigation as long as it remains unreversed. Not only in the Third Circuit, but in all circuits except the First, Second and Seventh, the invention of this federal cause of action will stimulate parties to labor agreements who are involved in labor disputes to emulate the employer here in exploring the potential of suing for interference therewith rather than confining themselves to the routes to relief marked out by Congress—the filing of § 301 suits for alleged *contract* breaches and of unfair labor practice charges and of § 303 suits for alleged misuse of economic weapons. The history of this particular tort in American labor history shows its mischievous potential. (See *infra* p. —.) And it takes but little imagination to picture circumstances which, though remote from the allegations of the complaint herein, might be deemed to be tortious interference with a labor contract. (To take but one example, a subcontractor who obtains work from an employer in violation of a lawful no-subcontracting provision of the agreement between the employer and the union would appear to be as liable for the loss of work and other damages to the employees as the breaching employer.)

For all these reasons the question presented should be resolved by this Court.

2. The decision below is wrong on several counts.

(a) As the District Court explained, the common law of improper interference with contractual relations is as subjective and amorphous as any developed by the courts, and in the present context recognizing such a cause of action requires an inquiry into matters regulated in terms by § 8 of the NLRA:

> An examination of the Restatement [(Second) of Torts] section [on improper interference with contractual relations] reveals that a pervasive inquiry is undertaken to determine liabiilty. Section 766 [thereof] provides:
>
> > One who intentionally and *improperly interferes* with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resutling to the other from the failure of the third person to perform the contract. [emphasis supplied]
>
> For [present] purposes * * *, the phrase "improperly interferes" is the key term in the Restatement formulation. The determination of whether an interference is "improper" involves an appraisal of various factors, a number of which are identified in Restatement (Second) of Torts § 767 (1977). Simply stated, "[t]he issue is whether in the given circumstances [the actor's] interest and the social interest in allowing the freedom claimed by him are sufficient to outweigh the harm that his conduct is designed to produce." Restatement (Second) of Torts § 766, comment c (1977).
>
> Weighing the interests of the parties in this action would necessitate consideration of matters specifically entrusted to the NLRB, * * * For example,

one factor to be taken into account under § 767 is lawlessness of the actor's conduct. *See* Restatement (Second) of Torts § 767, comment c (1977). Consideration of this factor under the circumstances of this case would require an assessment of whether the defendants' conduct is prohibited under 29 U.S.C. § 158.[22] Conversely, weighing the social interests would seem to require ascertaining whether defendants' activity is protected under 29 U.S.C. § 157, or unregulated because left to the free play of economic forces, * * *. Finally, consideration of the motive for the defendants' conduct, *i.e.*, whether their purpose was to reap individual gain or advance the interests of the members of the collective bargaining unit, would entail a significant inquiry into the underlying labor dispute.[23]

---

[22] Indeed, the issue of the defendant unions' conduct has already been brought before the NLRB. * * *

[23] It would also seem that plaintiff's unfair labor practice charge under § 8(b)(3) would encompass a claim that union officers are operating the strike paper for ulterior, selfish motives.

[Pet.App. 58a-60a; footnotes in original.]

Congress, of course, as this Court has emphasized, most recently in *Machinists* v. *Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, "has been rather specific when it has come to outlaw particular economic weapons" (*id.* at 143). Thus, "the use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of collective bargaining." (*Id.* at 149.) Accordingly, not even the NLRB, which has exclusive primary jurisdiction to enforce the Act (*San Diego Unions* v. *Garmon*, 359 U.S. 236), is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful," or to "introduce some standard of properly 'balanced' bar-

gaining power," or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." (*Machinists*, 427 U.S. at 149-150.)

It is entirely improbable that Congress nonetheless intended the federal courts to develop out of the formless raw materials of the common law of tortious interference with contractual relations a regulatory scheme of their own, parallel to that stated in § 8 of the NLRA, to govern conduct during a labor dispute that is thought to threaten the performance of contractual obligations.

(b) Section 301 on its face provides for redress against violations of contracts *not* for remedies against conduct that might, or that does, induce such violations. And, § 301's point is stated at the conclusion of the portion of the LMRA Senate Report entitled "Enforcement of Contract Responsibilities": "Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." (S. Rep. No. 105, 80th Cong., 1st Sess., p. 17.) So far as our research shows, there is not a word in the debates indicating a Congressional intent to regulate not only the "*parties to such agreements*" but third parties as well. (See generally *Lincoln Mills*, *supra*, 353 U.S. at 452-456 for a review of the legislative materials.)

Against this background, the legislative judgment stated in the LMRA Conference Report—"Once parties have made a collective contract the enforcement of that contract should be left to the usual processes of the law" (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., at 42)—can only be understood as a grant of authority to develop a federal law fashioned out of the rights and obligations created in labor contracts and applicable to the

parties to such contracts, not as a grant of authority to develop a federal law consisting of rights and obligations created by the judiciary and applicable to third persons who are not party to a labor contract.

That this was Congress' understanding of § 301's scope is confirmed by the recognition in the LMRA Senate Report that while no-strike commitments were particularly valued the inclusion of a no-strike promise in a collective agreement is a "point to be bargained over." (S. Rep. No. 105, *supra*, at 16-18.) Thus Congress did not impose such an obligation unless the union consented through collective bargaining. The policy that explains Congress' circumspection is explained in *Carbon Fuel Co.* v. *Mine Workers*, 444 U.S. 212, 218-219 (citations omitted):

> In the 1947 Taft-Hartley Act Congress sought to promote numerous policies. One policy of particular importance—if not the overriding one—was the policy of free collective bargaining. * * * And to make crystal clear the intention to leave the parties entirely free of any Government compulsion to agree to a proposal, or even reach an agreement, Congress added § 8(d) defining "to bargain collectively" as "not [to] compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). * * * It follows that the parties' agreement primarily determines their relationship. * * * If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution.

It is therefore hardly to be supposed that Congress intended to impose obligations arising from such a clause on a union or on others who had not bargained at all over the terms of the agreement. Yet, the consequence of the Court of Appeals' decision is that total strangers to a collective agreement are subject to suit

under § 301. (But see *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 254-255.)

(c) Prior to the enactment in rapid succession of the Norris-LaGuardia Act and of the NLRA, the " 'general' labor law * * * [was the] judge-made law of the late 19th and early 20th centuries * * *." (*Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 382.) Norris-LaGuardia's enactment evinced "a clear disapproval of the[] free-wheeling judicial exercises" that produced that law. (*Id.* at 382-383.) And the enactment of the NLRA, and later of the even more comprehensive LMRA, signaled Congress' determination that the national labor policy would be the legislature's policy.

The holding of the court below would reopen to judicial control a large variety of activities during labor disputes. It is particularly contrary to the whole history of labor-management relations in this country that such a venture should be undertaken in the name of the tort of improper interference with contractual relations. For, it is under that ruberic that some of the most notorious exercises in judicial policy making were undertaken. (See, e.g., *Hichmen Coal and Coke Co.* v. *Mitchell*, 245 U.S. 229; *Vegelahn* v. *Guntner*, 166 Mass. 92, 44 N.E. 1077, and the still pertinent objections to this approach by Justice Holmes dissenting in the latter case.)

The proposition that Congress, by enacting § 301 countenanced a result so destructive of its overall purposes in regulating labor relations is too irrational to be seriously entertained.

3. The sum of the matter is that it is the Second Circuit's understanding of the scope and limits of § 301 that is correct. As that court held in *Abrams*, *supra*, rejecting a § 301 claim indistinguishable from that here —that a conspiracy to induce a breach of a labor contract is actionable:

> [T]here exists no federal statute conferring independent jurisdiction upon the federal courts for claims of civil conspiracy in the labor relations field * * * nor does conspiracy to violate * * * a labor ocntract * * * suffice to vest the courts with jurisdiction pursuant to § 301 of the LMRA. See *Aacon Contracting Co.* v. *Association of Catholic Trade Unionists*, 178 F. Supp. 129 (E.D.N.Y. 1959), affirmed, 276 F.2d 958 (2d Cir. 1960). [434 F.2d at 1253.]

As the *Aacon Contracting* District Court had said: "The language of [§ 301] is explicit. It specifically refers to suits for violation of contracts between an employer and a labor organization. In this case there is no contractual relationship between the parties." (178 F.Supp. at 130). (See also *Baker, supra; Bowers, supra.*)

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WARREN J. BORISH
MERANZE, KATZ, SPEAR
& WILDERMAN
1200 Lewis Tower Building
15th & Locust Streets
Philadelphia, PA 19102

DONALD F. SUGARMAN
MILLER, COHEN, MARTENS
& SUGARMAN, P.C.
2460 First National Building
Detroit, MI 48226

DAVID BARR
BARR AND PEER
1899 L Street, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
202-637-5390
(Counsel of Record)

Appendix

81-594

No. —

Office - Supreme Court, U.S.
FILED
SEP 24 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120; THE NEWSPAPER GUILD AFL-CIO, CLC; WILKES-BARRE PRINTING PRESSMEN'S AND ASSISTANT'S UNION; WILKES-BARRE STEREOTYPER'S AND ELECTROTYPER'S UNION, LOCAL 139; INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, AFL-CIO; WILKES-BARRE TYPOGRAPHICAL UNION, LOCAL 187; WILKES-BARRE COUNCIL OF NEWSPAPER UNIONS, INC.; BROWN, WILLIAM M.; ORCUTT, JAMES H.; SABATINI, RICHARD V.; MAURER, JOSEPH A., JR,. WALLACE, JOHN J.; LADD, ROBERT; KAPORCH, JAMES; BOOTH, ROBERT,

Petitioners,

v.

WILKES-BARRE PUBLISHING CO.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WARREN J. BORISH
MERANZE, KATZ, SPEAR
& WILDERMAN
1200 Lewis Tower Building
15th & Locust Streets
Philadelphia, PA 19102

DONALD F. SUGARMAN
MILLER, COHEN, MARTENS
& SUGARMAN, P.C.
2460 First National Building
Detroit, MI 48226

DAVID BARR
BARR AND PEER
1899 L Street, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
202-637-5390
(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Third Circuit in *Wilkes-Barre Publishing Co.* v. *Newspaper Guild of Wilkes-Barre, etc., et al.*, C.A. 3, No. 80-2099 ..... 1a

Judgment of the United States Court of Appeals for the Third Circuit in *Wilkes-Barre Publishing Co.* v. *Newspaper Guild of Wilkes-Barre, etc., et al.*, C.A. 3, No. 80-2099 ..... 24a

Order of the United States Court of Appeals for the Third Circuit Amending Opinion in *Wilkes-Barre Publishing Co.* v. *Newspaper Guild of Wilkes-Barre, etc., et al.*, C.A. 3, No. 80-2099 ..... 26a

Second Order of the United States Court of Appeals for the Third Circuit Amending Opinion in *Wilkes-Barre Publishing Co.* v. *Newspaper Guild of Wilkes-Barre, etc., et al.*, C.A. 3, No. 80-2099 ..... 28a

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing by Wilkes-Barre Publishing Co. in *Wilkes-Barre Publishing Co.* v. *Newspaper Guild of Wilkes-Barre, etc., et al.*, C.A. 3, No. 80-2099 ..... 30a

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing by the Newspaper Guild of Wilkes-Barre, etc., et al., in *Wilkes-Barre Publishing Co.* v. *Newspaper Guild of Wilkes-Barre, etc., et al.*, C.A. 3, No. 80-2099 ..... 32a

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing by the International Printing and Graphic Communications Union, etc., et al., in *Wilkes-Barre Publishing Co.* v. *Newspaper Guild of Wilkes-Barre, etc., et al.*, C.A. 3, No. 80-2099 ..... 34a

TABLE OF CONTENTS—Continued

Page

Memorandum and Opinion of the United States District Court for the Middle District of Pennsylvania in *Wikes-Barre Publishing Co.* v. *Newspaper Guild of Wilkes-Barre Local 120, et al.*, Civil No. 79-1181.. 36a

Order of the United States District Court for the Middle District of Pennsylvania in *Wilkes-Barre Co.* v. *Newspaper Guild of Wilkes-Barre Local 120, et al.*, on remand from the United States Court of Appeals for the Third Circuit 80a

Order of the Supreme Court of the United States in *Newspaper Guild of Wilkes-Barre, etc., et al.* v. *Wilkes-Barre Publishing Co.*, No. A-114, Extending Time to File Petition for Writ of Certiorari 81a

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2099

WILKES-BARRE PUBLISHING CO.,
Appellant

v.

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120; THE NEWSPAPER GUILD AFL-CIO, CLC; WILKES-BARRE PRINTING PRESSMEN'S AND ASSISTANT'S UNION; WILKES-BARRE STEREOTYPER'S AND ELECTROTYPER'S UNION, LOCAL 139; INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, AFL-CIO; WILKES-BARRE TYPOGRAPHICAL UNION, LOCAL 187; WILKES-BARRE COUNCIL OF NEWSPAPER UNIONS, INC.; BROWN, WILLIAM M.; ORCUTT, JAMES H.; SABATINI, RICHARD V.; MAURER, JOSEPH A., JR., WALLACE, JOHN J.; LADD, ROBERT; KAPORCH, JAMES; BOOTH, ROBERT
Appellees

(D. C. Civil No. 79-01181)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued January 20, 1981

Before: GIBBONS, VAN DUSEN and WEIS, *Circuit Judges*

(Opinion filed April 1, 1981)

Allan M. Kluger, Esquire
Richard M. Goldberg, Esquire
Hourigan, Kluger & Spohrer
700 United Penn Bank Building
Wilkes-Barre, Pennsylvania 18701

William Caldwell Hancock, Esquire
(Argued)
Daniel C. Kaufman, Esquire
King & Ballow
24th Floor
First American Center
Nashville, Tennessee 37238
Attorneys for Appellant

Warren J. Borish, Esquire
(Argued)
Meranze, Katz, Spear & Wilderman
1200 Lewis Tower Building
15th and Locust Streets
Philadelphia, Pennsylvania 19102
Attorneys for Appellees, Newspaper Guild of Wilkes-Barre, Local 120, The Newspaper Guild, AFL-CIO, CLC, Wilkes-Barre Printing Pressmen's and Assistant's Union; Wilkes-Barre Stereotyper's and Electrotyper's Union, Local 139, Wilkes-Barre Typographical Union, Local 187, Wilkes-Barre Council of Newspaper Unions, Inc., William M. Brown, James H. Orcutt, Richard V. Sabatini, John J. Wallace, Robert Ladd, James Kaporch, Robert Booth
Donald F. Sugerman, Esquire
(Argued)

Nancy Schiffer, Esquire
Miller, Cohen, Martens &
Sugarman, P.C.
2460 First National Building
Detroit, Michigan 48226
Attorneys for Appellees,
International Printing and Graphic
Communications Union, AFL-CIO and
Joseph A. Maurer, Jr.

OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

Wilkes-Barre Publishing Company, (the Employer) a Pennsylvania corporation which publishes a daily newspaper, the *Times-Leader*, appeals from an order dismissing its three count complaint for declaratory and injunctive relief and compensatory and punitive damages. The defendants are the Newspaper Guild of Wilkes-Barre, Local 120 (the Local Guild), the Newspaper Guild (the International Guild), three newspaper trades local unions, and one newspaper trade international union, the Wilkes-Barre Council of Newspaper Unions, Inc. (the Council), a Pennsylvania corporation which publishes a daily newspaper, the *Citizens' Voice*, and eight individual residents of Pennsylvania each of whom is an official in one of the unions. The first count is brought pursuant to section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, for the alleged breach of a collective bargaining agreement between the Employer and the Local Guild. The second count charges that the International Guild breached the collective bargaining agreement or, alternatively, together with the newspaper trade unions, the eight individual defendants and the Council tortiously induced a breach of the Employer-Local Guild contract

in violation of section 301. The third count is a pendent claim under Pennsylvania law for tortious interference with the Employer-Local Guild contractual relationship. The trial court dismissed the section 301 breach of contract claim against the Local Guild for failure to exhaust arbitration remedies, and against the International Guild for failure to state a claim upon which relief could be granted. It dismissed all the tortious interference claims for want of subject matter jurisdiction. We hold that the court should not have dismissed the suit against the Local Guild, but should have stayed it pending arbitration. We reverse the dismissal of the remaining claims and remand for further proceedings.

I.

The Allegations of the Pleadings

Since 1938 the Employer has had a collective bargaining relationship with the Local Guild as representative of the editorial, advertising, circulation, business and maintenance employees. The most recent collective barbaining agreement, executed on January 18, 1978, contains a "Duration and Renewal" clause, Article XXV providing:

> 1. This agreement shall commence on the 3rd day of October 1976, and expire on the 30th day of September, 1978, and shall inure to the benefits of and be binding upon the successors and assigns of the Publisher.
>
> 2. At any time within sixty (60) days prior to the termination of this agreement, the Publisher or the [Local] Guild may initiate negotiations for a new agreement to take effect at the expiration of the present agreement. *The terms and conditions of this agreement shall remain in effect during such negotiations.* (emphasis supplied).

The collective bargaining agreement also contains Article XVII, providing:

> Employees of the Publisher shall be free to engage in any activities outside of working hours *provided such activities do not consist of service performed for publications in direct competition with the Publisher*, and provided further that, without permission, no employee shall exploit his connections with the Publisher in the course of such activities. (emphasis suppiied).

Finally, the collective bargaining agreement contains in Article XV (3) an arbitration clause providing:

> Any matter arising from the application of this agreement (except renewal of this agreement) which cannot be settled by the grievance committee shall be referred to a standing committee composed of not more than three (3) representatives of the [Local] Guild and not more than three (3) representatives of the Publisher in an effort to adjust such dispute. Any such matter not satisfactorily settled within thirty (30) days of its first consideration may be submitted to final and binding arbitration by either party. . . .

On August 29, 1978, within sixty days of the September 30 expiration date of the contract, the Employer and the Local Guild commenced negotiations for a new agreement. Negotiations continued through October 5. During those negotiations, on September 28, the Employer's bargaining representatives delivered to the Local Guild bargaining representatives a letter stating the Employer's position that by virtue of Article XXV the collective bargaining agreement continued in effect after September 30. Simultaneous negotations were also taking place, with the assistance of the Federal Mediation and Con-

ciliation Service, with the newspaper trade union locals representing production employees. The complaint does not allege that the production employees' collective bargaining agreements had a clause similar to Article XXV, but does allege that the Employer's position as to the automatic extension of the Local Guild contract was called to the attention of their representatives.

On October 6 the Local Guild and the production trades locals voted to strike. Prior to that time, and indeed prior to September 30, individual defendants John J. Wallace of the Local Guild, Robert Ladd of the Typographical Local, James Kaporch of the Pressmen's Local, and Robert Booth of the Stereotypers' Local caused the incorporation of the Council as a nonprofit corporation for the purpose of publishing a newspaper throughout the pendency of the labor dispute with the employer. For several weeks prior to the October 6 work stoppage, pre-incorporation organizational activities were undertaken for production and distribution of the *Citizens' Voice*, and at a rally held on October 6 the publishing plans were announced. Publication and distribution began on October 9, utilizing editorial, advertising, circulation and building maintenance personnel represented by the Local Guild and on strike against the Employer. The production personnel are also striking employees of the Employer. Distribution of the *Citizens' Voice* is to present and former *Times-Leader* subscribers, and advertising in it is solicited from *Times-Leader* advertisers.

On October 11, 1978 the Employer filed with the National Labor Relations Board a charge that by encouraging its employees to participate in the *Citizens' Voice* venture the Local Guild has committed the unfair labor practice of refusing to bargain in good faith in violation of section 8(b)(3) of the National Labor Relations Act. 29 U.S.C. § 158(b)(3). It later filed similar charges

against the production trades locals.[1] The National Labor Relations Board has found the existence of reasonable cause to believe the alleged unfair labor practice has occurred.[2]

The Employer alleges that by virtue of Article XXV its collective bargaining agreement with the Local Guild, including the prohibition in Article XVII against competitive employment, continued in force after September 30, 1978. By working for the *Citizens' Voice*, the Employer contends, the Guild members violated their contract. And by inducing Guild members to breach the terms of an extant collective bargaining agreement the unions and individuals involved in the *Citizens' Voice* enterprise tortiously interfered with that contract.

All defendants filed motions to dismiss. Those motions are addressed primarily to the legal sufficiency of the complaint. In one respect, however, new matter is pleaded, and conceded by the Employer. On November 9, 1978 the Employer attempted to grieve the dispute over Guild members' working for the *Citizens' Voice*. The Local Guild took the position that the contract had terminated. The Employer then submitted the grievance to arbitration. The parties designated an arbitrator in accordance with the terms of the contract, but the Local Guild expressly conditioned that designation on the understanding that it reserved the right to challenge arbitrability in a judicial forum for the reason that the contract, including the arbitration clause, had termi-

---

[1] The Employer contends that by creating a rival business enterprise while pretending to bargain collectively, the Local Guild and the production trades locals placed themselves in such a position of conflict of interest that their bargaining was not in good faith.

[2] Although the complaint does not so allege, the district court opinion discloses that the Board has stayed its unfair labor practice proceeding pending arbitration. The parties do not on appeal dispute that the Board has deferred to an arbitration forum.

nated. Before the arbitrator commenced a hearing, the Employer filed the instant lawsuit. The Local Guild objected, before the arbitrator, to proceeding before two tribunals, and the parties to the arbitration agreed to hold it in abeyance pending disposition of motions in the district court to dismiss the complaint.

Since when the district court acted it considered matters outside the pleadings, the motions were apparently considered under Fed. R. Civ. P. 12(c). No party contends, however, that there are any material issues of disputed fact, or that any party was deprived of a reasonable opportunity to present all materials pertinent to a rule 56 motion for summary judgment.

II

Jurisdictional Issues

Since the Local Guild is a party to a collective bargaining agreement and the Employer sues for an alleged violation there is no question of the court's jurisdiction over that defendant. 29 U.S.C. § 185(a); 28 U.S.C. §§ 1331, 1337. However, none of the remaining defendants are parties to the Employer-Local Guild contract. The pendent state law claim against them can be entertained only if the complaint alleges some other nonfrivolous independent basis for district court jurisdiction over them. See *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976); *Gagliardi v. Flint*, 564 F.2d 112 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978). *See also Kerry Coal Co. v. UMW*, 637 F.2d 957 (3d Cir. 1981). The Employer contends that a suit for violation of such a contract within the meaning of section 301 of the Labor Management Relations Act, actionable as a matter of

the federal common law of labor contracts.[3] Thus we must decide whether such a claim is one within the subject matter of the district court.

A. *The Individual Defendants*

The starting point for our analysis must be the Supreme Court's decision in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). In that case the Court held that a diversity action against members of a union with which the plaintiff had a collective bargaining agreement, for tortious interference with that contractual relationship, must be dismissed for failure to state a claim upon which relief can be granted. The issue was held to be one of "govern[ment] by the national labor relations law which Congress commanded this Court to fashion under § 301(a)." 370 U.S. at 247. However, in determining whether federal law permitted recovery, the Court found in section 301(b) an intention to isclate individual union members from liability for breach of contract by the union of which they were members.[4]

---

[3] Section 301 provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1976).

[4] Section 301(b) provides:

> Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor

Justice White wrote:

> The national labor policy requires and we hold that when a union is liable for damages for violation of the no-strike clause, its officers and members are not liable for these damages. Here, Count II, as we have said, necessarily alleges union liability but prays for damages from the union agents. Where the union has inflicted the injury it alone must pay.

370 U.S. at 249. *Atkinson* is directly controlling with respect to defendant John J. Wallace, the president of the Local Guild, at least insofar as the complaint seeks money damages. Any claim for money damages predicated either on Pennsylvania law or on federal common law of labor contracts is foreclosed as a matter of law. *See Republic Steel Corp. v. UMW*, 570 F.2d 467, 478 (3d Cir. 1978); 29 U.S.C. § 185(b) (1976).

In *Kerry Coal Co. v. UMW*, 637 F.2d 957 (3d Cir. 1981), we held that since an independent basis for federal jurisdiction existed a district court could entertain against individual union members a state law tort claim for tortious interference with contractual relations. There the plaintiff had neither a bargaining relationship nor a contractual relationship with the union of which the individual members belonged, and was not even an organizational target. Moreover the union objects which were being advanced by the violent activities complained of were secondary activities prohibited by section 8(b)(4). Neither *Atkinson* nor *Republic Steel*, in which state claims for money damages were preempted by section 301(b), dealt with the liability of individual members of

---

> organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member of his assets.

29 U.S.C. § 185(b) (1976).

labor organizations with which the employer did not have a contractual relationship. The case for federal common law preemption of the Pennsylvania law of torts was in the circumstances of *Kerry Coal* quite attenuated. *Kerry Coal*, therefore, is not dispositive of the existence of the state claim of tortious interference against the defendants in this case. Here, although only the Local Guild contract is alleged to have been extended past September 30, 1978, all the other local unions had bargaining relationships with the Employer, and the interference with the Guild contract is claimed to have been undertaken to increase their leverage in that relationship. Where the individual member liability sought to be imposed grows out of activities on behalf of a union with which the plaintiff has a bargaining relationship, and thus out of primary rather than secondary activities, the policies which the *Atkinson* Court identified in section 301(b) apply. Thus that section must be held to preempt any Pennsylvania law claim for money damages for tortious interference with the Guild contract as a result of such activities, and to preclude any similar federal law claim as well. The individual defendants Robert Ladd, president of the Typographical Local, James Kaporch, Secretary of the Pressmen's Local and Robert Booth, Secretary of the Stereotypers' Local all fall within this category. Three other individual defendants, James H. Orcutt and Richard V. Sabatini of the Guild International and Joseph A. Maurer, Jr. of the Pressmen's International, are situated somewhat differently, since the organizations of which they are members do not, according to the complaint, have either a bargaining or contractual relationship with the Employer. Nevertheless they, too, fall within the coverage of *Atkinson* because the complaint, fairly read, charges that they were acting on behalf of local unions which do. Thus neither under federal nor under state law does the complaint

state a cause of action for money damages upon which relief could be granted against the individual defendants.

Our conclusion that section 301(b) immunizes the individual defendants from liability for money damages does not, however, end the jurisdictional inquiry. The complaint also seeks injunctive and declaratory relief. Section 301(b) does not deal with either. It provides that "[a]ny *money judgment* against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." 29 U.S.C. § 185(b) (emphasis supplied). Union officials are joined routinely in section 301(a) actions seeking the injunctive and declaratory relief permitted by *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970). *See, e.g., Hampton Roads Shipping Ass'n v. International Longshoremen's Ass'n*, 631 F.2d 282 (4th Cir. 1980), *application for stay denied*, 49 U.S.L.W. 3530 (1981); *Pittsburgh-Des Moines Steel Co. v. United Steelworkers*, 633 F.2d 302 (3d Cir. 1980); *Waller Bros. Stone Co. v. United Steelworkers*, 620 F.2d 132 (6th Cir. 1980). Unlike the *Boys Market* cases, however, which are recognized exceptions to the Norris-LaGuardia Act, 29 U.S.C. § 101, et seq., the complaint in this case falls within that Act to the extent that it seeks injunctive relief. At the pleading stage, however, we are in no position to determine whether the injunctive relief sought is prohibited by section 4 of that Act, 15 U.S.C. § 104, or permitted under section 7, 15 U.S.C. § 107. The complaint, to the extent that it seeks injunctive relief against the Local Guild strike, may fall within *Boys Markets*. If so, some of the non-party defendants may be appropriate defendants in order to make an injunction effective. *United States Steel Corp. v. Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046 (3d Cir. 1970). To the extent that what is sought is not a termination of the

strike, but a termination of the alleged violation of the covenant not to work for a competitor, Norris-LaGuardia may not apply. At this stage in the lawsuit we cannot say that the Norris-LaGuardia Act deprived the district court of jurisdiction over the claim for injunctive relief. Moreover, the Norris-LaGuardia Act does not prohibit the grant of declaratory relief in appropriate cases. *Bituminous Coal Operators' Ass'n, v. UMW*, 585 F.2d 586, 594-96 (3d Cir. 1978). Thus even as to the individual defendants it is necessary to consider whether a claim of interference with a labor contract is one arising under the federal common law of labor contracts which would justify declaratory or injunctive relief. Since that issue is common to the liability of the defendant unions other than the Local Guild, we discuss it below.

B. *The Local Union Defendants*

The local union defendants do not enjoy the section 301(b) immunity defined by *Atkinson, supra.* Nor do unions enjoy any general preemption of state law tort remedies. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) (trespassory peaceful picketing subject to state law governing trespass); *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977) (NLRA does not preempt state action for intentional infliction of emotional distress); *UMW v. Gibbs*, 383 U.S. 715, 721 (1966) (violent activity subject to state law). However, with the exception of the Local Guild, to which the *Boys Markets* exception may apply, the unions are protected by the Norris-LaGuardia Act. But that Act affords them no protection against damage actions or actions for declaratory relief. *See, e.g., Kerry Coal Co. v. UMW, supra*; *Bituminous Coal Operators' Ass'n v. UMW, supra.* More-

over it may not afford protection against unlawful tortious conduct.[5]

C. *The Council*

The Council, the proprietor of the *Citizens' Voice* which has allegedly induced the Local Guild's breach of the collective bargaining agreement, is for purposes of subject matter jurisdiction in the same position as the unions. In this case it happens that the competitor is a creature of several labor organizations, but analytically the section 301(a) issue would be no different if the competitor were owned by Rupert Murdoch. It does not enjoy immunity under section 301(b); it is protected by the Norris-LaGuardia Act, but to an extent which on this record we cannot determine; and may be answerable in damages for the consequences of the breach of contract it induced, assuming that inducement is proven.

III. *Federal Subject Matter Jurisdiction*

With those general principles in mind we turn to the question whether a claim of tortious interference with a labor contract should be recognized as stating a claim under the federal common law of labor contracts. The Employer urges that the question was answered affirmatively in *Nedd v. UMW*, 556 F.2d 190, 196 (3d Cir.

---

[5] *See, e.g.*, Grace Co. v. Williams, 96 F.2d 478 (8th Cir. 1938). The Eighth Circuit quoted the legislative history of the Norris-LaGuardia Act in which it was stated:

> It is not sought by this bill to take away from the judicial power any jurisdiction to restrain by injunctive process unlawful acts, or acts of fraud or violence.

Id. at 481. Thus, the Act's proscription against injunctive relief is not necessarily limited to fraudulent or violent unlawful conduct. *Cf.* Texaco Independent Union v. Texaco, Inc., 452 F. Supp. 1197, 1103 n.1 (W.D. Pa. 1978). *But cf.* Wilson & Co. v. Birls, 105 F.2d 948, 952 (3d Cir. 1939); United States Steel Corp. v. UMW, 320 F. Supp. 743, 745 (W.D. Pa. 1970).

1977), *cert. denied*, 434 U.S. 1013 (1978), while the defendants claim that it was answered negatively in *Teamsters Local Union No. 30 v. Helms Express, Inc.*, 591 F.2d 211 (3d Cir.), *cert. denied*, 100 S. Ct. 74 (1979). Actually, neither case is completely dispositive.

In *Nedd* we held that a claim that trustees of a pension plan and a union which dominated the trustees had in violation of their fiduciary duties failed to enforce royalty claims in favor of the pension fund due under a collective bargaining agreement stated a nonfrivolous claim under section 301(a). We stressed, however, that the source of the rights asserted was a collective bargaining agreement. 556 F.2d at 197 n.10. We noted:

> The federal common law of collective bargaining agreements, which grows out of 29 U.S.C. § 185(a), would permit pension trust fund beneficiaries to sue, derivatively, to enforce the mine operators' payment obligations when the trustees did not. It is but a small step further to suggest that the same federal common law of collective bargaining agreements permits a suit against the Fund Trustees, and the Union which allegedly acted in concert with them for destruction of the value of the bargained-for and vested contract rights.

556 F.2d at 197. Moreover we noted that the policy considerations which favored recognition of a uniform federal law of collective bargaining agreements apply with equal force to the claim against trustees for failing to enforce the provisions of such an agreement. 556 F.2d at 197-98. Thus *Nedd* stands for the proposition that, so long as the obligation sought to be enforced has its source in the provisions of a collective bargaining agreement, remedies for its enforcement may be available under section 301(a) in suits other than on the contract itself. But *Nedd* involved parties, the trustees of a pension fund

and the union which dominated them, which had a fiduciary obligation to enforce the contract against employers. That is not the case with the defendants here. *Nedd* is instructive, however, in its recognition of the undesirability of relegating issues bearing on liability for violations of collective bargaining agreements to state law. Thus it is suggestive, but not controlling.

Teamsters Local Union No. 30 v. Helms Express Inc., supra, involved an action to set aside an arbitration award made by the Eastern Conference Joint Area Committee of the Teamsters Union. In an effort to avoid the rule of *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123, 1128 (3d Cir. 1969), confining court review of arbitration awards to a determination of whether the award can in a rational way be derived from the agreement, plaintiffs urged that the Eastern Conference award breached a duty of fair representation. Thus, the plaintiffs contended, the more generous standard of review of the merits of arbitration awards where the union presenting the grievance has breached a duty of fair representation ought to apply. *See Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976). In rejecting this contention we noted that section 301 provides only for suits for violation of contracts, that the Eastern Conference was not a party to a contract, did not represent employees in a bargaining unit, and thus had no duty of fair representation. *Helms* simply does not speak to the issue before us because there was no collective bargaining agreement which could have been violated as a result of the Eastern Conference arbitration award. Strong evidence that the *Helms* opinion cast no doubt upon what we held in *Nedd* is that its careful author did not mention that case.

When *Nedd* and *Helms* are read together, what emerges as the law of the circuit as to the meaning of section 301(a) is that it reaches not only suits *on* labor

contracts, but suits seeking remedies *for violation* of such contracts. That interpretation is consistent with the explicit direction of the Supreme Court that section 301 should not be read narrowly. *See, e.g., Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). The issue is not the nature of the remedy sought for the alleged violation, but whether the remedy sought may require that the court from which it is sought, state or federal, interpret a collective bargaining agreement. Thus the section has been construed to afford subject matter jurisdiction for the tort of violating a duty of fair representation in enforcing the contract, *Thomas v. Consolidation Coal Co.*, 380 F.2d 69, 76-77 n.7 (4th Cir.), *cert. denied*, 389 U.S. 1004 (1967); *House v. Mine Safety Appliances Co.*, 417 F. Supp. 939, 941 (D. Idaho 1976), as well as for participating in the violation of a fiduciary duty in failing to enforce the contract, *Nedd v. UMW, supra.* It affords subject matter jurisdiction for declaratory relief as to the meaning of the contract. *Bituminous Coal Operators' Ass'n v. UMW, supra.* All suits for violation of collective bargaining agreements are governed by federal law, because Congress intended that the scope of obligation in labor contract in or affecting interstate commerce be uniform. *Local 174, International Brotherhood of Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). It is the need for national uniformity in determining the scope of obligation agreed to in labor contracts that determines whether a federal standard is applicable, and which determines, incidentally, that there is concurrent state and federal subject matter jurisdiction.

In this case it is charged that a competitor of the Employer and the participating unions tortiously induced the Employer's employees to breach their collective bargaining agreement. An essential element of the cause of action, whether injunctive relief or damages

is sought, is a violation of the collective bargaining agreement. The relief sought is to recover for or prevent that violation. The label attached to the remedy as tort or contract is not dispositive of the scope of federal common law which under section 301(a) it is our responsibility to create.[6] A holding that tortious interference with a collective bargaining agreement is not a matter governed by federal law would leave open the possibility of lack of uniformity in scope of obligation which the Court in *Lucas Flour* sought to prevent, and which in *Nedd v. UMW*, 556 F.2d at 198, we said was undesirable. The claim of tortious interference with a labor contract does not involve conduct touching "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). Unlike protection against violence, *United Automobile Workers v. Russell*, 356 U.S. 634 (1958), or protection of reputation, *Linn v. Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), or freedom from mental distress, *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977), or possession of real property, *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 436 U.S. 180 (1978), protection against tortious interference does not involve an area traditionally relegated to the states. Rather it involves protection of a property interest—a labor contract—which has its being in and draws its

---

[6] *Contra* Curtis Bay Towing Co. of Pa. v. National Maritime Union, 206 F. Supp. 741, 743 (E.D. Pa. 1962); Wiggins v. Pan American World Airways, Inc., 83 L.C. ¶ 10,419, at 17,686. *But cf.* Abrams v. Carrier Corp., 434 F.2d 1234, 1253 (2d Cir. 1970), *cert. denied sub nom.* United Steelworkers v. Abrams, 401 U.S. 1009 (1971) (no federal 301 jurisdiction over claim of civil conspiracy to violate labor contract). In none of these cases did the court analyze the problem in terms of the need to enforce a collective bargaining agreement.

vitality from the federal common law of labor contracts. We hold, therefore, that a claim of tortious interference with a labor contract is one arising under federal common law over which the district court has jurisdiction. 26 U.S.C. § 301(a); 28 U.S.C. §§ 1331, 1337. As with the law of labor contracts generally, in determining such a case "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." *Textile Workers Union v. Lincoln Mills*, 353 U.S. at 457. This is particularly true with respect to which parties may be considered to be joint tortfeasors in the alleged inducement.

We conclude that the district court, in dismissing the complaint for lack of subject matter jurisdiction against all defendants except the Local Guild and the International Guild, erred.

IV. *Claims Reached on the Merits*

A. *The International Guild*

The district court assumed it had subject matter jurisdiction over the International Guild because the complaint alleged that it was a party to the collective bargaining agreement. It granted summary judgment on the section 301 breach of contract claim because it found that there was no dispute over the fact that only the Local Guild was a party to the collective bargaining agreement. Having concluded that there was no federal law cause of action for tortious interference with a contractual relationship, the court did not discuss that claim insofar as it bore on the liability of the International Guild. But since there was a separate nonfrivolous section 301 claim that it was a party to the contract within its subject matter jurisdiction the court

found it necessary to discuss whether it should entertain the pendent state law claim for tortious interference. It concluded that where parties to a labor dispute are charged with tortious interference with a collective bargaining agreement, at least in the absence of outrageous or violent conduct, state law causes of action are preempted. Our analysis in Part II B above, and that of the district court are in this respect consistent. The preemption conclusion, arrived at by a somewhat different route, was correct. The issue is one of federal law. But whereas the district court would preempt state law protections of labor contracts while at the same time denying that the federal common law affords any protection, leaving the Employer wholly unprotected from tortious interference, we have held that section 301(a) grants the federal courts authority to develop such protections. Thus the dismissal of the claim against the International Guild must be reversed. Since there will be a remand it is appropriate to address the grant of summary judgment on the section 301(a) contract claim as well.

The allegations of the complaint with respect to International Guild representatives Orcutt and Sabatani, which are not disputed, would, we think, permit the Employer to prove a state of facts satisfying the agency standards laid down in *Carbon Fuel Co. v. UMW*, 444 U.S. 212 (1979), under which the International Guild can be held responsible for these individuals' acts. The *Carbon Fuel* agency standard applies whether the liability sought to be assessed against the International Guild is based on breach of contract or the inducing of a breach. We agree with the district court that on this record the International Guild is clearly not a party to the collective bargaining agreement; it did not bind itself to the employment covenant. Its liability, if any, must result from the fact that it induced a breach of contract by

the Local Guild. Thus, the summary judgment in favor of the International Guild on Count I must be affirmed. The complaint does allege, though, and it is not disputed, that Orcutt and Sabatini are assisting the management of the *Citizens' Voice*, and thus assisting in the unlawful inducement of a breach of the covenant not to work for a competitor.[7] Thus the case must be remanded for consideration of the tortious interference claim.

B. *The Local Guild*

As in the case of the International Guild, the district court assumed it had subject matter jurisdiction because it is undisputed that the Local Guild is a party to the collective bargaining agreement enforcement of which is sought. The court dismissed the contract claim on the ground that the Employer had failed to exhaust remedies before the arbitrator. We noted above that the Employer actually grieved the dispute over violation of the agreement not to work for a competitor, and sought arbitration. This suit was commenced only when the union reserved the right to challenge arbitrability in a post arbitration enforcement proceeding. The preservation of jurisdictional objections before an arbitrator is permissible. *International Brotherhood of Teamsters, Local 249 v. Western Pennsylvania Motor Carriers Ass'n*, 574 F.2d 783, 786 n.2 (3d Cir), *cert. denied*, 439 U.S. 828 (1978); *Bakery and Confectionary Workers v. National Biscuit Co.*, 378 F.2d 918, 921 (3d Cir. 1967). When the defendants called to the court's attention the language of the arbitration clause and the pendency of the arbitration proceeding, their motion could fairly be construed as an application for a stay of the pending

[7] It is also alleged that the International Guild sanctioned and ratified the work stoppage. However, the work stoppage is not alleged to be unlawful. Only the breach of the employment covenant is relied on by the Employer.

action, insofar as subject matter jurisdiction over the contract claim was not disputed.

The court concluded that the arbitration clause is ambiguous, that the parties contracted for an arbitral determination of its meaning, and that this is what they should receive. We agree. The parties agreed that the arbitrator was to decide "any matter arising from the application of this Agreement (except renewal of this Agreement)." The ambiguity arises because of the contention that under Article XXV, the contract continued, rather than being renewed. In these circumstances, the language may well be broad enough to encompass arbitrability of the dispute over bargaining unit members' working for a competitor. *See Chauffeurs, Teamsters and Helpers, Local Union No. 765 v. Strochmann Bros. Co.*, 625 F.2d 1092 (3d Cir. 1980). However in dismissing the complaint, the court decided the issue of arbitrability, leaving to the arbitral forum only the question whether there was a breach. The court's decision that the dispute is arbitrable could be construed as deciding that the contract had not terminated, a question which the Local Guild raised before the arbitrator. We think the court went too far. It certainly should not have gone forward with the contract claim against the Local Guild either. Rather than deciding any part of the contract dispute on the merits, and dismissing, it should have stayed the action against the Local Guild.

IV

A Stay is Appropriate

There remains the question whether the tortious interference claim against the remaining parties ought also to be stayed pending arbitration. We hold that it should be. The parties to the contract have chosen a contractual method—arbitration—for the determination

of disputes over its interpretation. Third parties, charged with interfering with the contract by inducing a violation should be entitled to have it construed by the expert tribunal selected for that purpose by the plaintiff, before having to respond to a charge of tortious conduct.

We recognize that if the Employer loses before the arbitrator on his breach of contract claim and the award becomes final by enforcement in the district court, the Employer may be collaterally estopped from proceeding against the third parties. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333-337 (1979); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded*, 100 S. Ct. 3040 (1980). That is one of the consequences of having chosen a contractual remedy for filling in the gaps in party expectations and undertakings. The Employer cannot be heard to complain that third parties should receive the benefit of the chosen method of contract intepretation before answering to a charge that they induced a breach which the arbitrator may find did not even occur. On the other hand a victory before the arbitrators will not necessarily foreclose religitation by the third parties in the district court. Thus on remand the entire case should be stayed pending arbitration.

V

Except to the extent that the court granted summary judgment to the International Guild on Count I, the judgment appealed from will be reversed, and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2099

WILKES-BARRE PUBLISHING CO.,
Appellant
v.

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120; THE NEWSPAPER GUILD AFL-CIO, CLC; WILKES-BARRE PRINTING PRESSMEN'S AND ASSISTANT'S UNION; WILKES-BARRE STEREOTYPER'S AND ELECTROTYPER'S UNION, LOCAL 139; INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, AFL-CIO; WILKES-BARRE TYPOGRAPHICAL UNION, LOCAL 187; WILKES-BARRE COUNCIL OF NEWSPAPER UNIONS, INC.; BROWN, WILLIAM M.; ORCUTT, JAMES H.; SABATINI, RICHARD V.; MAURER, JOSEPH A., JR.; WALLACE, JOHN J.; LADD, ROBERT; KAPORCH, JAMES; BOOTH, ROBERT

(D. C. Civil No. 79-01181)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: GIBBONS, VAN DUSEN and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on January 20, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 25, 1980, be, and the same is hereby reversed, except insofar as it granted summary judgment to the International Guild on Count I, and the cause remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

Clerk

April 1, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2099

WILKES-BARRE PUBLISHING CO.,
Appellant

v.

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120; THE NEWSPAPER GUILD AFL-CIO, CLC; WILKES-BARRE PRINTING PRESSMEN'S AND ASSISTANT'S UNION; WILKES-BARRE STEREOTYPER'S AND ELECTROTYPER'S UNION, LOCAL 139; INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, AFL-CIO; WILKES-BARRE TYPOGRAPHICAL UNION, LOCAL 187; WILKES-BARRE COUNCIL OF NEWSPAPER UNIONS, INC.; BROWN, WILLIAM M.; ORCUTT, JAMES H.; SABATINI, RICHARD V.; MAURER, JOSEPH A., JR., WALLACE, JOHN J.; LADD, ROBERT; KAPORCH, JAMES; BOOTH, ROBERT
Appellees

(D. C. Civil No. 79-01181)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued January 20, 1981

Before: GIBBONS, VAN DUSEN and WEIS, *Circuit Judges*

(Filed April 1, 1981)

ORDER AMENDING OPINION

The slip opinion in the above matter is hereby amended as follows:

Page 8 Part II, line 10:

"See" should be italicized.

Page 9 Third line from bottom in text:

"isolate" is amended to read "insulate"

Page 13 Line 7:

delete comma after "*Ass'n*"

Page 14 Second line from bottom in text:

"100 S. Ct. 74" is amended to read "444 U.S. 837"

Page 20 Full paragraph, line 10:

"the inducing" is amended to read inducement"

Page 22 Fifth line from bottom:

"333-337" should read "333-37"

JOHN J. GIBBONS
Circuit Judge

Dated: April 6, 1981

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2099

WILKES-BARRE PUBLISHING CO.,
Appellant

v.

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120; THE NEWSPAPER GUILD AFL-CIO, CLC; WILKES-BARRE PRINTING PRESSMEN'S AND ASSISTANT'S UNION; WILKES-BARRE STEREOTYPER'S AND ELECTROTYPER'S UNION, LOCAL 139; INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, AFL-CIO; WILKES-BARRE TYPOGRAPHICAL UNION, LOCAL 187; WILKES-BARRE COUNCIL OF NEWSPAPER UNIONS, INC.; BROWN, WILLIAM M.; ORCUTT, JAMES H.; SABATINI, RICHARD V.; MAURER, JOSEPH A., JR., WALLACE, JOHN J.; LADD, ROBERT; KAPORCH, JAMES; BOOTH, ROBERT
Appellees

(D. C. Civil No. 79-01181)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued January 20, 1981

Before: GIBBONS, VAN DUSEN and WEIS, *Circuit Judges*

(Filed April 1, 1981)

ORDER AMENDING OPINION

The slip opinion in the above matter is hereby amended as follows:

Slip at 19, Part IV.A., line 4:

Replace "granted summary judgment on" with dismissed"

Slip at 20, full paragraph, lines 16-17:

Replace:

"Thus, the summary judgment in favor of the International Guild on Count I must be affirmed."

with

"Thus the rule 12(b) dismissal of the International Guild on Count I must be affirmed, without prejudice to any application the employer may make to the district court for leave to amend the pleadings."

By the Court

JOHN GIBBONS
Circuit Judge

Dated: May 8, 1981

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2099

WILKES-BARRE PUBLISHING CO.,
Appellant

v.

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120; THE NEWSPAPER GUILD AFL-CIO, CLC; WILKES-BARRE PRINTING PRESSMEN'S AND ASSISTANT'S UNION; WILKES-BARRE STEREOTYPER'S AND ELECTROTYPER'S UNION, LOCAL 139; INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, AFL-CIO; WILKES-BARRE TYPOGRAPHICAL UNION, LOCAL 187; WILKES-BARRE COUNCIL OF NEWSPAPER UNIONS, INC.; BROWN, WILLIAM M.; ORCUTT, JAMES H.; SABATINI, RICHARD V.; MAURER, JOSEPH A., JR., WALLACE, JOHN J.; LADD, ROBERT; KAPORCH, JAMES; BOOTH, ROBERT
Appellees

(D. C. Civil No. 79-01181)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Before GIBBONS, VAN DUSEN and WEIS, *Circuit Judges*

Upon the consideration of the petition for rehearing by Wilkes-Barre Publishing Company before the original panel,

It is ORDERED that the petition for rehearing before the original panel is denied.

By the Court

/s/ John J. Gibbons
Circuit Judge

Dated: May 11, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2099

WILKES-BARRE PUBLISHING CO.,
Appellant

v.

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120; THE NEWSPAPER GUILD AFL-CIO, CLC; WILKES-BARRE PRINTING PRESSMEN'S AND ASSISTANT'S UNION; WILKES-BARRE STEREOTYPER'S AND ELECTROTYPER'S UNION, LOCAL 139; INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, AFL-CIO; WILKES-BARRE TYPOGRAPHICAL UNION, LOCAL 187; WILKES-BARRE COUNCIL OF NEWSPAPER UNIONS, INC.; BROWN, WILLIAM M.; ORCUTT, JAMES H.; SABATINI, RICHARD V.; MAURER, JOSEPH A., JR.; WALLACE, JOHN J.; LADD, ROBERT; KAPORCH, JAMES; BOOTH, ROBERT
Appellees

(D. C. Civil No. 79-01181)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Newspaper Guild of Wilkes-Barre, Local 120, the Newspaper Guild, AFL-CIO, CLC, Wilkes-Barre Printing Pressmen's and Assistant's Union, Local 137, Wilkes-Barre Stereotypers and Electrotypers Union, Local 139, Wilkes-Barre Typographical Union, Local 187, Wilkes-Barre Council of Newspaper Unions, Inc., William M. Brown, James H. Orcutt, Richard V. Sabatini, John J. Wallace, Robert Ladd, James Kaporch and Robert Booth, Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant the petition.

By the Court,

/s/ John J. Gibbons
Judge

Dated: May 11, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2099

WILKES-BARRE PUBLISHING CO.,
Appellant

v.

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120; THE NEWSPAPER GUILD AFL-CIO, CLC; WILKES-BARRE PRINTING PRESSMEN'S AND ASSISTANT'S UNION; WILKES-BARRE STEREOTYPER'S AND ELECTROTYPER'S UNION, LOCAL 139; INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, AFL-CIO; WILKES-BARRE TYPOGRAPHICAL UNION, LOCAL 187; WILKES-BARRE COUNCIL OF NEWSPAPER UNIONS, INC.; BROWN, WILLIAM M.; ORCUTT, JAMES H.; SABATINI, RICHARD V.; MAURER, JOSEPH A., JR.; WALLACE, JOHN J.; LADD, ROBERT; KAPORCH, JAMES; BOOTH, ROBERT
Appellees

(D. C. Civil No. 79-01181)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by International Printing & Graphic Communications Union, AFL-CIO and JOSEPH A. MAURER, JR. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would grant the petition.

By the Court,

/s/ JOHN J. GIBBONS
Judge

Dated: May 15, 1981

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 79-1181

WILKES-BARRE PUBLISHING COMPANY

v.

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120, ET AL.

[Filed Jun. 25, 1980]

MEMORANDUM AND ORDER

The Wilkes-Barre Publishing Company instituted the above-captioned action on September 18, 1979, predicating jurisdiction on § 301(a) of the Labor Management Relations Act,[1] and the doctrine of pendent jurisdiction.[2] The complaint contains three counts and asserts interrelated causes of action against three distinct sets of defendants. Count I sets forth a claim against the Newspaper Guild of Wilkes-Barre, Local 120 (hereinafter

---

[1] Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[2] Plaintiff seeks to invoke the variant of pendent jurisdiction commonly referred to as pendent *party* jurisdiction, which involves the discretionary assumption of jurisdiction over a party as to whom no independent basis of federal jurisdiction exists. *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 20 (3d ed. 1976).

referred to as "Guild Local"),[3] alleging that members of Guild Local violated a provision of the collective bargaining agreement prohibiting outside competitive activity by participating in the organization and operation of a strike newspaper.[4] Count II avers that The Newspaper Guild (hereinafter referred to as "Guild International") also breached or, alternatively, tortiously induced members of Guild Local to breach the "Outside Activity" clause. The remaining defendants, local and international unions representing other employees of plaintiff,[5] various officials of the defendant unions,[6] and the Wilkes-Barre Council of Newspaper Unions, Inc., owner and

---

[3] Guild Local represents employees in plaintiff's news department, including reporters, copyreaders, business office employees, and advertising, circulation, and maintenance department personnel.

[4] Article XVIII of the collective bargaining agreement between Guild Local and plaintiff provides:

> Employes of the Publisher shall be free to engage in any activities outside of working hours provided such activities do not consist of service performed for publications in direct competition with the Publisher, and provided further that, without permission, no employe shall exploit his connections with the Publisher in the course of such activities.

[5] These defendants include the Wilkes-Barre Printing Pressman's and Assistant's Union, Local 137, which represents the employees operating plaintiff's presses; the Wilkes-Barre Stereotyper's and Electrotyper's Union, Local 139, which represents press-plate department production employees; the International Printing and Graphic Communications Union, which has chartered both the Pressman's Local and the Stereotyper's Local; and the Wilkes-Barre Typographical Union, Local 187, which is the collective bargaining agent for composing room production employees.

[6] Named as defendants are William Brown, James Orcutt, and Richard Sabatini, representatives of Guild International; Joseph Maurer, a representative of Pressman's International; John Wallace, president of Guild Local; Robert Ladd, president of Typographical Local; James Kaporch, secretary of Pressman's Local; and Robert Booth, secretary of Stereotyper's Local.

publisher of the strike newspaper known as the *Citizens' Voice*, are charged in Count III with tortiously interfering with the contractual relationship between plaintiff and Guild Local by procuring the participation of Guild Local members in the operation of the strike paper.

All defendants have moved to dismiss, asserting among sundry grounds two common objections to the complaint: (1) that plaintiff has failed to exhaust administrative remedies, and (2) that judicial intervention in this labor relations matter is pre-empted by the National Labor Relations Act (NLRA). Additionally, the labor organization defendants, other than Guild Local, have moved to dismiss on the ground that the complaint fails to allege that they breached collective bargaining agreements with plaintiff; the Union officers have moved to dismiss on the basis that Union representatives cannot be held individually liable for actions taken in their official capacities; all defendants, other than Guild Local, have moved to dismiss on the ground that assertion of pendent jurisdiction over the state law claim of tortious interference with the performance of a contract is inappropriate; and defendants Joseph Maurer and the International Printing & Graphic Communications Union have moved to dismiss plaintiff's request for an injunction, contending that such equitable relief would offend their First Amendment rights.

After close examination of the pertinent authorities and careful consideration of the parties' respective arguments, I have reached the following conclusions: (1) plaintiff's claim of tortious interference with a collective bargaining agreement is not subsumed under the federal common law of labor relations; (2) pendent party jurisdiction exists over plaintiff's state law claim of tortious interference; (3) plaintiff's claim of tortious interference is pre-empted by the NLRA; (4) plaintiff has failed to allege the existence of a collective bargaining

agreement with Guild International; and (5) plaintiff has failed to exhaust arbitration remedies with respect to the § 301 claim asserted against Guild Local.[7]

I. FACTUAL BACKGROUND

At the core of this lawsuit is a protracted labor dispute between the Wilkes-Barre Publishing Company, which owns and publishes a daily newspaper of general circulation in the Wilkes-Barre area known as the *Times Leader*, and the labor organizations representing *Times Leader* employees for collective bargaining purposes. Since October of 1978, when the parties reached an impasse in contract negotiations, *Times Leader* employees, acting under the aegis of the unions named as defendants in this proceeding, have been on strike and operating a so-called "interim strike newspaper." Plaintiff does not contest in this forum the legitimacy of the publication as an economic strike weapon. Rather, plaintiff argues that members of Guild Local are *contractually* bound not to work on the strike paper, and that the remaining defendants tortiously induced Guild Local members to breach this commitment. Thus, the focal point of this action is the collective bargaining agreement between plaintiff and Guild Local.

The last collective bargaining contract between Guild Local and plaintiff was executed on January 18, 1978, but had a retroactive effective date of October 3, 1976.[8] The duration of this contract is governed by Article XXV, which provides:

---

[7] Also pending before the court are motions to regulate the sequence and timing of discovery, for a protective order and to strike plaintiff's post-argument brief. The latter motion will be denied. Disposition of the motions to dismiss in defendants' favor obviates consideration of the discovery motions.

[8] This contract will be referred to as the 1976 collective bargaining agreement.

1. This agreement shall commence on the 3rd day of October, 1976, *and expire on the 30th day of September, 1978*, and shall inure to the benefit of and be binding upon the successors and assigns of the Publisher.

2. At any time within sixty (60) days prior to the termination of this agreement, the Publisher or the Guild [Local] may initiate negotiations for a new agreement to take effect at the expiration of the present agreement. *The terms and conditions of this agreement shall remain in effect during such negotiations.*

Any increases in wages or other changes shall be retroactive to October 1, 1978. [emphasis added]

In accordance with Article XXV, Guild Local, on July 26, 1978, advised the Federal Mediation and Conciliation Service and the Pennsylvania Department of Labor and Industry that written notice of the proposed termination or modification of the existing collective bargaining agreement had been served upon plaintiff. On August 29th, the first of the currently ongoing series of collective bargaining sessions was conducted between representatives of Guild Local and plaintiff. The talks concerning a new agreement continued through September 1978. Negotiations with the other labor organizations representing *Times Leader* employees also were conducted during this time period. None of the unions, however, entered into a collective bargaining agreement with plaintiff, and on October 6, 1978, the labor organizations sanctioned and ratified a strike against *Times Leader*. Several weeks prior to the walkout, representatives of the defendant unions undertook organizational activities to publish and distribute the *Citizens' Voice* as a strike newspaper. On or about September 27, 1978, some three days prior to the contract's expiration date, articles of incorporation were filed under the Pennsylvania Non-Profit Corpora-

tion Law by representatives of the local unions, including Guild Local, on behalf of the Wilkes-Barre Council of Newspaper Unions, Inc. The avowed purpose of this non-profit entity was "to create, establish, and administer a newspaper . . . throughout the pendency of the current labor dispute by and between the Wilkes-Barre Publishing Company and any one or more of the following unions; namely, Wilkes-Barre Printing Pressman's and Assistant's Union Local 137, Wilkes-Barre Typographical Union Local 187, Wilkes-Barre Stereotyper's and Electrotyper's Union Local 139, and Newspaper Guild of Wilkes-Barre Local 120 . . . ." The *Citizens' Voice* was first published on October 9, 1978, using, among others, striking employees represented by Guild Local.

Plaintiff alleges that negotiations with Guild Local are continuing, and that the 1976 collective bargaining agreement therefore remains operative. Its position is stated in a letter circulated in a negotiation session conducted September 28, 1979. The letter emphasized that "the terms of the present agreement, including the grievance and arbitration obligations, continue during negotiations after the expiration date of September 30." The letter also admonished that "[t]he Company . . . will pursue all legal remedies available (including an action for monetary damages incurred) against the Wilkes-Barre Newspaper Guild, its agents and all others who may be held legally culpable in the event that the Guild should fail to live up to its obligations under the law."

Two days after the strike newspaper began publication and five days after the walkout, plaintiff filed an unfair labor practice charge with the National Labor Relations Board (NLRB), asserting that Guild Local had violated section 8(b)(3) of the NLRA [9] by encouraging and di-

---

[9] Section 8(b)(3) of the NLRA, 29 U.S.C. § 158(b)(3), provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

recting its members to work on the *Citizens' Voice* in violation of Article XVIII of the 1976 collective bargaining agreement, which, *inter alia*, prohibits Guild Local members from engaging in activities outside of working hours that "consist of service performed for publications in direct competition with the Publisher. . . ." On October 18, 1978, plaintiff again filed unfair labor practice charges with the NLRB under section 8(b)(3), this time against the other local union defendants, asserting that "new and special interests [acquired in the operation of the *Citizens' Voice*] necessarily conflict with the good faith interest on negotiating a collective bargaining agreement concerning the wages, hours and working conditions of the Company employees." The NLRB subsequently found reasonable cause to believe that the alleged violations of the Act had been committed by the defendant local unions, but proceedings before it were stayed pending the outcome of arbitration proceedings instituted by plaintiff.

Plaintiff initially attempted to grieve the outside activity question by letter dated November 9, 1978. This letter concluded:

> The existing agreement of the parties contemplates a meeting within five (5) days after receipt of this request and further contemplates a standing committee meeting prior to referral to American Arbitration Association for arbitration. If I have not been contacted by you to schedule a meeting within five (5) days after your receipt of this letter, I shall assume that you disagree with our position and that you desire to waive any meetings concerning this grievance. In that event, we will promptly submit

---

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of § 159(a) of this title. . . .

this matter to the American Arbitration Association for arbitration.

Counsel for Guild Local responded by letter dated November 15, 1978, advising plaintiff that the union was taking the position that the 1976 contract had terminated, and, consequently, that "there is no right or obligation of either party to utilize or respond to the grievance procedure contained in the expired Agreement." On December 4, 1978, plaintiff submitted its grievance to the American Arbitration Association. By letter dated January 16, 1979, Guild Local selected its preferences from a list of arbitrators, but reserved its right to have issues of substantive arbitrability determined, if deemed appropriate, by a court. At an arbitration hearing conducted September 27, 1979, Guild Local reiterated its reservations to proceeding before the arbitrator:

> So the record is clear, and I want it to be very clear, we are specifically reserving the right to contend, if it becomes necessary, that this matter is not substantively arbitrable and/or that there is no collective bargaining agreement which is applicable.
>
> We are willing and in fact interested, because it's really an interesting issue, although I think it's a clear issue, even were there an effective contract in existence, to go ahead with the merits of the case; that is, whether or not the establishment by the Guild of a strike paper that it has been conducting for the duration of this rather nasty and prolonged work stoppage can conceivably constitute a violation of the clause to which reference has been made.
>
> So we are willing to go ahead and to have you render a decision on that. But we want your decision to reflect and the record to reflect that by so doing we do not waive other rights. . . .

> We are willing to come to an end product with you of whether or not our activities constituted a violation of that clause, but we reserve the right, and do so by putting everyone on notice, that we are not prejudicing our right to contend that this entire issue is not substantively arbitrable and/or that there is no collective bargaining agreement in effect. But this is not the forum in which to do that, so we are prepared to go forward with you in this forum.

Counsel for Guild Local then noted his objection to proceeding with the arbitration while the instant action was pending, and the parties agreed to stay arbitration pending the disposition of defendants' motions to dismiss.

II. THE LEGAL ISSUES

The paramount issues raised by defendants' motions are (1) whether plaintiff must litigate its § 301 claim against Guild Local before an arbitrator; and (2) whether plaintiff's claims are pre-empted by the NLRA. Affirmative responses to both questions dispose of the entire action. The parties, however, have also interposed a number of objections that relate to individual facets of the litigation, and these subsidiary matters will be addressed first.[10]

A. *The § 301 Claim for Tortious Interference with a Contractual Relationship*

It is well-settled that representatives of a labor organization may not be held accountable in damages for authorized conduct taken in their official capacities. *See Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 245-49

---

[10] Because the motions to dismiss will be disposed of in defendants' favor, the First Amendment argument raised by two of the defendants will not be discussed inasmuch as adjudication of constitutional issues is to be avoided whenever possible.

(1962). It is also well-settled that section 301 creates federal jurisdiction only over parties to the collective bargaining agreement. *See Teamsters Local 30 v. Helms Express, Inc.*, 591 F.2d 211 (3d Cir.), *cert. denied*, —— U.S.——, 100 S.Ct. 74 (1979). Thus, it would appear that the individual defendants are not subject to suit under § 301, and that subject matter jurisdiction exists only over Guild Local and Guild International, the two labor organizations alleged in the complaint to have been parties to the 1976 collective bargaining agreement. Plaintiff argues, however, that these two axioms of federal labor law have no applicability here because its complaint may be construed as alleging that union officers did not act on behalf of the labor organizations they represent, and that the federal common law fashioned under § 301 would encompass a claim of tortious interference with the performance of a collective bargaining agreement asserted against individuals and the unions they represent.[11]

The mandate to construct substantive federal law in suits arising under § 301 is indeed broad. As the Court indicated in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957), "[t]he range of judicial inventiveness will be determined by the nature of the problem."

---

[11] Plaintiff's contention that the complaint pleads a cause of action against the individual defendants for tortiously inducing a breach of the 1976 collective bargaining agreement requires a strained construction. Paragraph 53 of the Complaint merely alleges that the individual defendants *and* the labor organizations they represent acted "individually and pursuant to a . . . conspiracy . . . to interfere with performance by those Times Leader employees Guild represents of their obligations under the AGREEMENT. . . ." There is no mention of a personal motive or an allegation that the officers acted other than in their official capacities. It should also be noted that there is a logical inconsistency in plaintiff's theories of recovery inasmuch as it appears that the Unions may be held liable only if their agents acted with authority, and the officers may be held liable only if their conduct was unauthorized.

But there is little authority supporting the proposition that a claim of tortious interference with a collective bargaining agreement is subsumed under the federal common law of labor relations. Although the Court of Appeals for the Third Circuit has ruled that "a claim of tortious interference with the collective bargaining agreement by a [pension] Fund Trustee states a non-frivolous cause of action under § 301 of the Taft-Hartley Act sufficient to support pendent jurisdiction of state law claims in federal court," *Nedd v. U.M.W.*, 556 F.2d 190, 198 n.12 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *see also Chapman v. Southeast Region I.L.G.W.U. Health and Welfare Recreation Fund*, 265 F. Supp. 675, 679 (D. S.C. 1967), its holding was carefully limited: *"The issue before us is neither the legitimacy of such a cause of action nor the capacity of federal common law to encompass it,* but rather the appropriateness of couching it in terms of § 301." [12] *Nedd v. U.M.W.*, 556 F.2d at 198 n.12 (emphasis added).

---

[12] Furthermore, *Nedd* does not speak to the situation in which members of a labor organization are induced to breach a collective bargaining contract during the course of a labor-management dispute. *Nedd* was a suit by pensioned coal miners against the trustees of the Anthracite Health and Welfare Fund (Fund) and the UMW for failure to enforce anthracite coal mine operators' contractual obligation to pay tonnage royalties. Plaintiffs' theory was that the trustees and the UMW "favored the interests of working miners over those of retirees and therefore failed to take prudent action to collct delinquencies from mine operators, who provided job opportunities." *Id.* at 105. While the trustees were not signatories to collective bargaining agreements with the operators, the royalty obligations were created by the collective bargaining contracts, which did recognize that the trustees had standing to enforce the royalty provisions. Furthermore, the pensioned miners, although also not formal parties to the collective bargaining contracts, could sue under § 301 to enforce their terms. The Court of Appeals thus concluded that "[w]here the trustee may sue and wrongfully fails to do so, the beneficiary may sue the trustee as well as the party or parties the trustee failed to sue. . . . [T]he . . . federal common law of collective bargaining agreements

More recently, the Court of Appeals intimated that § 301 could not be utilized to assert federal jurisdiction over a claim of tortious interference with a collective bargaining agreement. In *Teamsters Local 30 v. Helms Express, Inc.*, 591 F.2d 211, (3d Cir.), *cert. denied*, ——U.S. ——, 100 S.Ct. 74 (1979), the court, quoting approvingly from a decision refusing to recognize a § 301 cause of action for tortious interference, stated:

> Section 301 creates federal jurisdiction only over parties to the contract, and federal jurisdiction under § 301 is limited to '[s]uits for violation of contracts between an employer and a labor organization. . . .' 29 U.S.C. § 185. Thus, in *Aacon Contracting Co. v. Ass'n of Catholic Trade Unionists*, 178 F. Supp. 129 (E.D. N.Y. 1959), claiming that the defendant union attempted to compel plaintiff to breach a collective bargaining agreement it had with another union, plaintiff attempted to assert federal jurisdiction over the dispute even though there was no contractual relationship between plaintiff and de-

---

permits a suit against the Fund Trustees, and the Union which allegedly acted in concert with them for the destruction of the value of the bargained-for and vested contract rights." *Id.* at 197. It would appear from the court's language that *Nedd* applies where a party charged with the duty of protecting vested contract rights wrongfully fails to do so, and no reported decision has cited *Nedd* for the proposition that the federal common law of labor relations encompasses a cause of action for tortious interference with a collective bargaining contract occurring during the course of a labor-management dispute.

It should also be noted that if such a claim comes under § 301, state law is excluded. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957). If tortious interference is not cognizable under § 301, then jurisdiction over the state common law tort action would have to be pendent to the breach of contract claim asserted against Guild Local. Thus, unlike *Nedd*, the issue here is not the appropriateness of couching plaintiff's claim in terms of § 301, but the legitimacy of such a cause of action.

> fendant. The complaint was dismissed and the Second Circuit affirmed, 276 F.2d 958 (2d Cir. 1960), on the opinion of the trial judge: 'The language of the statute is explicit. It specifically refers to suits for violation of contracts between an employer and a labor organization. In this case there is no contractual relationship between the parties.' 178 F. Supp. at 130. While clearly this does not prevent Sever, as an individual member of a signatory union from claiming under § 301, *Smith v. Evening News Ass'n.*, *supra*, 371 U.S. at 200, 83 S.Ct. 267, he may only bring suit against the parties signatory to the agreement, and here the Eastern Conference is not a party.

Id. at 217.[13]

The result apparently countenanced in *Teamsters Local 30*, *supra*, is in accord with that reached in prior reported decisions of other courts. *See, e.g., Beausoleil v. United Furniture Workers*, 244 F. Supp. 719, 720 (D. N.H. 1975); *Curtis Bay Towing Co. v. National Maritime Union*, 206 F. Supp. 741, 743 (E.D. Pa. 1962); *Burlesque Artists Association v. I. Hirst Enterprises, Inc.*, 134 F. Supp. 203, 204 n.2 (E.D. Pa. 1955). For example, in *Curtis Bay Towing Co. v. National Maritime Union*, *supra*, then District Judge, now Senior Circuit Judge Van Dusen was called upon to assess the sufficiency of a federal cause of action based on allegations that the defendant union had induced members of two other local unions with which plaintiff had collective bargaining agreements to violate the no-strike provisions of those

---

[13] The Court of Appeals thus concluded that because the Eastern Conference Joint Area Committee, a joint union-employer grievance committee, was not a party to the collective bargaining agreement, the district court lacked jurisdiction over plaintiff's claim that the Eastern Conference had breached the duty of fair representation.

contracts. Judge Van Dusen declined to recognize a cause of action under § 301, stating:

> Section 301 enables unions to sue and be sued for violation of contract. The present plaintiffs have no contract with any of the defendants. The second cause of action is based on the allegation that the defendants induced plaintiffs' employees represented by the named local unions not to perform their contracts and to engage in work stoppage and that they induced other companies not to enter into a business relationship with plaintiffs, thus preventing plaintiffs from performing tugboating services.
>
> These allegations do not assert violation of a contract to which defendants are a party, but rather sound in tort for recovery for inducing breach of contract or interfering with business relationships. Although the question is not free from doubt, the undersigned concludes that the second cause of action is not the type contemplated by the legislators who enacted § 301 and cannot be sustained under that section.

Id. at 743.

I concur in Judge Van Dusen's analysis, which bears strong resemblance to the approach so recently utilized in *Teamsters Local 30, supra.* Accordingly, plaintiff's tortious interference claim is not cognizable under § 301.[14]

B. *Pendent Party Jurisdiction*

Rejection of § 301 as a jurisdictional predicate does not necessarily foreclose litigation of the tortious interference cause of action. It must also be determined

[14] This ruling is limited to a tortious interference claim asserted against non-signatories to the 1976 collective bargaining agreement, and intimates no opinion on the extent to which tort claims against signatories may be subsumed under § 301.

whether under the circumstances of this case pendent jurisdiction will be extended to cover parties as to whom no independent basis of federal jurisdiction exists. Two recent Supreme Court cases, *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), and *Aldinger v. Howard*, 427 U.S. 1 (1976), indicate that a three-step process should be pursued to ascertain whether pendent party jurisdiction should be exercised. First, the court must consider whether there is constitutional power to entertain the state law claim. Such power exists where the state law cause "is brought in conjunction with a significant claim that is properly based, and the two claims 'derive from a common nucleus of operative fact' and 'are such that [a court] . . . would ordinarily be expected to try them . . . in one judicial proceeding. . . .'" *Haddon Township Board of Education v. New Jersey Department of Education*, 476 F. Supp. 681, 686 (D. N.J. 1979). The present case clearly satisfies this test.

The second inquiry requires "an examination of the posture in which the non-federal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether 'Congress in [that statute] has . . . expressly or by implication negated' the exercise of jurisdiction over the particular non-federal claim." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. at 373. The parties have not provided any guidance on this most difficult aspect of pendent party jurisdiction, and careful scrutiny of the relevant statutory language fails to reveal a clear answer.

On the one hand, § 301(a) does *not* confer exclusive jurisdiction in the federal courts, thus eliminating one compelling reason militating for the exercise of pendent party jurisdiction. *See Aldinger v. Howard*, 427 U.S. at 18; *Haddon Township Board of Education v. New Jersey Department of Education*, 476 F. Supp. at 687. As the court in *Kroger* observed:

> A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims in a case such as this one, since it is he who has chosen the federal rather than the state forum and must thus accept its limitations. '[T]he efficiency plaintiff seeks so avidly is available without question in the state courts.'

437 U.S. at 376.

On the other hand, case law prior to *Aldinger* and *Kroger* recognized assertion of pendent party jurisdiction over claims directed at parties who were not suable under § 301. *See, e.g., Connecticut General Life Insurance Co. v. Craton*, 405 F.2d 41 (5th Cir. 1968); *Trustees of the Colorado Pipe Industry Employee Benefit Fund v. Colorado Spring Plumbing and Heating Co.*, 388 F. Supp. 71 (D. Colo. 1975). In addition, unlike *Kroger* and *Aldinger*, there is no manifestation of congressional intent, either express or implicit, to preclude assertion of pendent party jurisdiction.[15]

Although the question is not free from doubt, I believe that the absence of any indication of legislative intent suggesting that the defendants are immune from suit under § 301, as in contrast to *Kroger* and *Aldinger*, *see* note 14 *supra*, militates in favor of pendent party jurisdiction. Accordingly, the court must address the final prong of the three-part inquiry: whether considerations of judicial economy, convenience, and fairness to the

---

[15] *Kroger* held that the requirement of *complete* diversity of citizenship implicit in 28 U.S.C. § 1332(a)(1) prevented a plaintiff in a diversity action from amending her complaint to seek recovery from a non-diverse impleaded party. *Aldinger*, which ante-dated Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), held that since a county was not then subject to suit under 42 U.S.C. § 1983, jurisdiction could not be asserted over a state law claim against a county in a civil rights action against county officials.

litigants compel a discretionary exercise of jurisdiction. Since the tortious interference claim is integrally bound to and dependent upon the § 301 claim, exercise of pendent jurisdiction would appear to be reasonable. Accordingly, were the ancillary jurisdiction issue the only question before the court, discretion would be exercised in favor of assertion of pendent party jurisdiction.

A finding that the tortious interference claim may be brought in federal court as pendent to a non-frivolous § 301 cause of action, however, does not end the jurisdictional inquiry. It must now be determined whether under the circumstances of this case a claim of tortious interference with the collective bargaining agreement is pre-empted by the NLRA.

C. *Pre-emption*

Federal labor legislation seeks to strike a balance in labor-management relations by protecting certain conduct, *see* 29 U.S.C. § 157, prohibiting certain activities, *see* 29 U.S.C. § 158, and leaving other conduct controlled by " 'by the free play of economic forces.' " *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976). The labor law pre-emption doctrine seeks to protect this congressionally established equilibrium "of protection, prohibition and laissez-faire" by foreclosing judicial or state administrative "accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes. . . ." Cox, *Labor Law Pre-Emption Revisited*, 85 HARV. L. REV. 1337, 1351, 1356 (1972). The formula designed to safeguard this congressional scheme from unwarranted intrusion was first announced in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959):

> When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment must yield . . . .
>
> . . . .
>
> When an activity is arguably subject to § 7 or § 8 of the Act, the State as well as the Federal courts must [also] defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

This formulation was subsequently extended to cover "permitted" conduct, *i.e.*, activity unregulated "because left 'to be controlled by the free play of economic forces.' " *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. at 140. *Accord, Local 20 Teamsters v. Morton*, 377 U.S. 252 (1964).

Two related, but nonetheless distinct, rationales undergird these labor law pre-emption rules: the primary jurisdiction theorem and the supremacy clause principle. *See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 199-200 (1978). The primary jurisdiction theory is used to justify pre-emption where the activity sought to be litigated "is subject to the unfair labor practice jurisdiction of the Federal [National Labor Relations] Board," [16] *id.* at 199

---

[16] As the court in Garner v. Teamsters Local 776, 346 U.S. 485, 490, 491 (1953), explained:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed the particular procedure for investigation, complaint and notice, and hearing and deci-

n.29; the supremacy clause theory focuses on the extent to which Congress has occupied the field of labor relations.[17] Use of either rationale to justify pre-emption

---

sion, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid . . . diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the Federal Board, precludes state courts from doing so.

[17] Clause 2 of Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding.

Justice Frankfurter in Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480-81 (1955), expounded on the line of analysis premised on this constitutional provision:

> By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy exclusion of state action. . . . But . . . the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U.S. at 488. 'This penumbral area can be rendered progressively clear only by the course of litigation.' 348 U.S. at 480-81.

in a particular case requires consideration of what a majority of Justices identified in *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979), as the "crucial" pre-emption inquiry: "Whether the application of the state law in question 'would frustrate the effective implementation of the [NLRA's] processes.'" *Id.* at 588 (Powell, J., dissenting).[18] *Accord, Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. at 147-48. Thus, "it [has not] mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." *San Diego Building Trades Council v. Garmon*, 359 U.S. at

---

[18] The court in *New York Telephone Co.* held that payment of unemployment compensation to striking employees was not foreclosed by the NLRA. The court's judgment was announced in a plurality opinion penned by Justice Stevens, in which Justices White and Rehnquist joined. A majority of the Court, however, disagreed with Justice Stevens' pre-emption analysis. Justice Blackmun, concurring in the judgment with Justice Marshall, wrote separately to express his view that "[t]he crucial inquiry is whether the exercise of state authority 'frustrate[s] effective implementation of the Act's processes,' not whether the State's purpose was to confer a benefit on a class of citizens." *Id.* at 550. Justice Powell, dissenting with the Chief Justice and Justice Stewart, also recognized the frustration test as the "crucial" inquiry. In addition, Justice Brennan, who concurred in the result, refrained from explicitly adopting or rejecting the plurality's pre-emption analysis.

It should be noted that *New York Telephone Co.* did not involve arguably protected or arguably prohibited conduct. The "frustration" test discussed in the concurring and dissenting opinions, however, would seem to have general applicability to all cases involving NLRA pre-emption. *See The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 270 (1979).

244. *Accord, Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. at 193; *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290, 300 (1977).

The cases that have excepted state tort claims from the pre-emption doctrine are consistent with the "frustration" test, "reflect[ing] a balanced inquiry into such factors as the nature of the state and federal interest in regulation and the potential for interference with federal regulation." *Id.* As a majority of Justices observed in *New York Telephone Co.*, such cases do not purport to hold that state tort laws are pre-empted only by a compelling congressional directive.[19] 440 U.S. at 548 (Blackmun, J., concurring in the judgment); 440 U.S. at 558 (Powell, J., dissenting). Indeed, cases falling within the exception have generally involved personal torts or violence to property, and their holdings have been closely circumscribed. *See, e.g., Farmer v. United Brotherhood of Carpenters, Local 25, supra* (intentional infliction of emotional distress); *Linn v. Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (malicious libel); *UAW v. Russell*, 356 U.S. 634 (1958) (mass picketing and threats of violence); *Youngdahl v. Rainfair*, 355 U.S. 131 (1957) (threats of violence or provoking violence); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954) (violence). *See generally The Supreme Court*, 1978 Term, 93 HARV. L. REV. 60, 273 n.56 (1979). For example, in *Linn v. Plant Guard*

---

[19] Thus, contrary to plaintiff's suggestion, there is no presumption *against* pre-emption of lawsuits based on tortious conduct. Rather, a majority of Justices in *New York Telephone Co.* recognized that any state law which, whether intentionally or unintentionally, "significantly affects the balance of bargaining power set by the NLRA" is presumptively pre-empted. *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 270 (1979). *See New York Telephone Co.*, 440 U.S. at 549 (Blackmun, J., concurring in the judgment).

Workers, Local 114, supra, the Court, concerned that the availability of libel remedies would "dampen the ardor of labor debate . . ., truncate the free discussion envisioned by the Act, [and] . . . be used as weapons of economic coercion," limited its holding "to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." [20] *Id.* at 65.

In addition, cases finding an exception to the pre-emption doctrine generally "involve state-law principles with only incidental application to conduct occurring in the course of a labor dispute." *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. at 300. *See generally* Cox, *Labor Law Pre-emption Revisited*, 85 HARV. L. REV. 1337, 1365-68 (1972). Thus, the Court in *Farmer*, while holding that a claim of intentional infliction of mental distress was not pre-empted, reiterated that "concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme." *Id.* at 305. In sum, "where the state law rule of decision is based upon an accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes, [so] that . . . its application to persons under NLRB

---

[20] The Court in Farmer v. United Brotherhood of Carpenters, Local 25, 430 U.S. at 299, explained the limits of the *Linn* holding:

> "[T]he Court adopted by analogy the standards enunciated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and held that state damages actions in this context would escape pre-emption only if limited to defamatory statements published with knowledge or reckless disregard of their falsity. The Court also held that a complainant could recover damages only upon proof that the statements had caused him injury, including general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or any other form of harm recognized by state tort law.

jurisdiction will upset the balance struck by Congress," application of the state law should be preempted. Cox, *Labor Law Pre-emption Revisited*, 85 HARV. L. REV. 1337, 1356 (1972). *See also Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. at 155-56. (Powell, J., concurring).

Litigation of the Pennsylvania common law tort of intentional interference with the performance of a contract would require the accommodation of the special interests involved in the field of labor-management relations, and thus has the potential to disturb the equilibrium established by Congress. Since litigation of plaintiff's tort claim may frustrate the effective implementation of the NLRA's processes, it must be refused as pre-empted.

Pennsylvania has adopted the second Restatement approach to the tort of intentional interference with the performance of a contract. *See Adler, Barnish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 431 (1978), *cert. denied*, 442 U.S. 907 (1979). An examination of the Restatement section reveals that a pervasive inquiry is undertaken to determine liability. Section 766 of the Restatement (Second) of Torts provides:

> One who intentionally and *improperly interferes* with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract. [emphasis supplied]

For purposes of this lawsuit, the phrase "improperly interferes" is the key term in the Restatement formulation. The determination of whether an interference is "improper" involves an appraisal of various factors, a

number of which are identified in Restatement (Second) of Torts § 767 (1977).[21] Simply stated, "[t]he issue is whether in the given circumstances [the actor's] interest and the social interest in allowing the freedom claimed by him are sufficient to outweigh the harm that his conduct is designed to produce." Restatement (Second) of Torts § 766, comment c (1977).

Weighing the interests of the parties in this action would necessitate consideration of matters specifically entrusted to the NLRB, thus suggesting pre-emption under the primary jurisdiction rationale. For example, one factor to be taken into account under § 767 is the lawfulness of the actor's conduct. *See* Restatement (Second) of Torts § 767, comment c (1977). Consideration of this factor under the circumstances of this case would require an assessment of whether the defendants' conduct is prohibited under 29 U.S.C. § 158.[22] Conversely,

---

[21] Section 767 of the Restatement (Second) of Torts provides:

> In determining whether an actor's conduct in intentionally interfering with the contract or a prospective contractual relationship of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interest in protecting the freedom of action of the actor and the contractual interest of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.

[22] Indeed, the issue of the defendant unions' conduct has already been brought before the NLRB. The fact that the ultimate legal questions before the court and the Board may not be identical is

weighing the social interests would seem to require ascertaining whether defendants' activity is protected under 29 U.S.C. § 157, or unregulated because left to the free play of economic forces, thus suggesting pre-emption under the supremacy clause rationale. Finally, consideration of the motive for the defendants' conduct, *i.e.*, whether their purpose was to reap individual gain or advance the interests of the members of the collective bargaining unit, would entail a significant inquiry into the underlying labor dispute.[23] Under these circumstances I believe that the state common law tort of tortious interference with the performance of a contract is pre-empted.

Sears, Roebuck & Co. v. San Diego District Council of Carpenters, supra, on which plaintiff relies, does not compel a contrary result. *Sears*, which held that an action seeking to enjoin trespassory picketing was not pre-empted, turned upon the Court's findings that there was an insignificant risk of prohibition of protected conduct, and that the employer had no other forum in which to litigate either the trespass issue or the protection issue. *Id.* at 200-01; *Comment*, Sears, Roebuck & Co. v. San

---

not alone dispositive. The focus of the pre-emption doctrine is on the *activities* or *conduct* sought to be regulated by judicial or administrative action. *See Comment*, Sears, Roebuck & Co. v. San Diego County District Council of Carpenters: *A New Exception to the Labor Law Pre-emption Doctrine*, 32 RUTGERS L. REV. 577, 594 (1979). To recognize as dispositive the likeness of the ultimate issue before the Board and the court "hinges the outcome of a pre-emption claim on the skill with which an employer frames his complaint." *Id.* This anomalous consequence is avoided by focusing on whether application of the state law requires consideration of matters entrusted to the NLRB. In this case, application of the state tort law on tortious interference patently requires consideration of whether defendants' conduct constitutes an unfair labor practice.

[23] It would also seem that plaintiff's unfair labor practice charge under § 8(b)(3) would encompass a claim that union officers are operating the strike paper for ulterior, selfish motives.

Diego County District Council of Carpenters: *A New Exception to the Labor Law Pre-emption Doctrine*, 32 RUTGERS L. REV. 577, 589 (1979). In the matter *sub judice*, however, plaintiff has triggered the NLRB processes, and a determination of whether defendant's conduct is protected, prohibited or unregulable would seem to be required in the disposition of the unfair labor practice charge. In addition, there would appear to be a more substantial risk here that protected conduct could be prohibited. Unlike *Sears*, where the Court found that trespassory picketing is rarely protected, organization and operation of a strike newspaper is generally recognized as protected concerted activity, a fact plaintiff's counsel seemed to concede at oral arguments. *See, e.g., Thompson Newspapers, Inc. v. Toledo Typographical Union No. 63*, 387 F. Supp. 351, 353 (E.D. Mich. 1974).

Furthermore, the court in *Sears* recognized that a tortious interference claim would involve "'a real and immediate potential for conflict with the federal scheme . . . .'" 436 U.S. at 194 n. 24. Thus, the Court noted that pre-emption "would undoubtedly obtain if an employer subject to recognitional or secondary picketing sought injunctive relief in state court on the theory that the union was tortiously interfering with his freedom to contract." *Id. See also Farmer v. United Brotherhood of Carpenters*, 430 U.S. at 300 n.9.

This dicta from *Sears* comports with the holdings in the majority of reported decisions that have addressed the issue of pre-emption of a tortious interference claim. For example, in *Plumbers' Union v. Borden*, 373 U.S. 690 (1963), the Court held pre-empted an employee's claim that the Union had interfered with his right to contract. *Accord, Local 207, International Bridge Workers Union v. Perko*, 373 U.S. 701 (1963). And in *Genesco, Inc. v. Joint Council 13, United Shoeworkers*, 230 F. Supp. 923, 930 (S.D. N.Y. 1964), *aff'd on other grounds*,

341 F.2d 482 (2d Cir. 1965), the court declared pre-empted state claims charging inducement of other labor organizations to break their collective bargaining contracts with the plaintff. *Cf. Iodice v. Calabrese*, 512 F.2d 383, 390 n.11 (2d Cir. 1975).

I believe that these cases require pre-emption where, as here, parties to a labor dispute are charged with tortious interference with the performance of a contract, but are not alleged to have engaged in outrageous or violent conduct. Under these circumstances, judicial application of state tort rules could intrude on matters arguably consigned to the NLRB, or regulate conduct left to be controlled by the free play of economic forces. In either case, there is a significant potential for "frustration of effective implementation of the Act's processes." Accordingly, plaintiff's tortious interference claim will be dismissed for want of subject matter jurisdiction.[24]

D. *The § 301 Claim Against Guild International*

This pre-emption ruling applies to the tortious interference claim asserted against all defendants, including Guild International. Plaintiff, however, has alternatively alleged that Guild International is a party to the 1976 collective bargaining agreement and breached the outside activity clause. This breach of contract claim fails directly under § 301 and, therefore, is not subject to pre-emption. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 561 (1976); *William E. Arnold Co. v. Carpenters*, 417 U.S. 12, 16 (1974); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962);

---

[24] This ruling would seem to be mandated even if the tortious interference claim was subsumed under § 301 inasmuch as application of federal common law would have the same potential for frustrating the effective implementation of the NLRA's processes.

Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 513 (1962); *General Warehousemen Local 767 v. Standard Brands, Inc.*, 579 F.2d 1282, 1289 (5th Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979). Guild International, however, contends that it is not a party to the collective bargaining contract, and requests an assessment of the sufficiency of the complaint.

Initially, it must be observed that "an international union is not *per se* responsible for the conduct of a local which is a collective bargaining agent." *Fabian v. Freight Drivers Local 557*, 448 F. Supp. 835, 838 (D. Md. 1978). *Accord, Walters v. Roadway Express, Inc.*, 400 F. Supp. 6, 13-14 (S.D. Miss. 1975) *aff'd in part*, 557 F. 2d 521 (5th Cir. 1977). *Cf. Teamsters Local 30 v. Helms Express, Inc.*, 591 F.2d at 216-17. Where, as here, the international organization is not a signatory to the collective bargaining agreement there must be some allegation that the international has assented to be bound by the terms of the contract in order to properly invoke § 301 jurisdiction.

Plaintiff's complaint contains no such allegation, and plaintiff's brief, in addressing the issue, offers no amplification. Plaintiff merely alleges an agency relationship between Guild Local and Guild International, and that Guild Local executed the 1976 collective bargaining agreement on behalf of Guild International. An examination of the '76 agreement, however, belies plaintiff's bold averment of a contractual relationship with Guild International. Article II of the agreement recognizes Guild Local as the *exclusive* bargaining agent for the designated employees. In addition, the contract concerns terms and conditions of employment, and does not purport to confer any rights or obligations on Guild International. Finally, the contract was executed by representatives of plaintiff and Guild Local, and there is no designation that any Guild Local officer acted on behalf of Guild International.

Compare Colonial Hardwood Floor Co. v. International Furniture Workers, 76 F. Supp. 493, 495 (D. Md. 1948) (agreement signed by representative of International).

Plaintiff's reliance on cases finding a local union bound to a contract negotiated and signed by an international organization, *see e.g., Blake Construction Co. v. Laborer's International Union*, 511 F.2d 324, 329 (D.C. Cir. 1975); *National Elevator Industries, Inc., v. Local 5, International Union of Elevator Constructors*, 426 F. Supp. 343, 345 (E.D. Pa. 1977); *Central Appalachian Coal Co. v. UMW*, 376 F. Supp. 914, 920-21 (S.D. W.Va.); *United States Steel Corp. v. UMW*, 320 F. Supp. 743, 746-47 (W.D. Pa. 1970), is misplaced. These decisions recognized the common fact that national organizations often bargain with employers on behalf of their constituent members, who accept the benefits and are bound by the obligations contained in such agreements. It seems somewhat anomalous, however, to find an International a party to an agreement that (a) recognizes the local as the exclusive bargaining agent; (b) concerns only conditions and terms of employment; and (c) is not signed by a representative of the International. Accordingly, I believe the complaint fails to properly allege the existence of a contractual relationship with Guild International, and, therefore, plaintiff's contract claim against Guild International will be dismissed for failure to state a claim upon which relief may be granted.[25]

E. *The § 301 Claim Against Guild Local*

There remains then only the claim against Guild Local for breach of contract. The dispositive issue asserted with respect to this cause of action concerns exhaustion

[25] It is also significant that plaintiff did not seek to compel Guild International to submit to arbitration. Were Guild International a party to the collective bargaining agreement it would be subject to the arbitration clause.

or arbitral processes. Before addressing this matter, however, I feel constrained to comment upon the unique posture in which plaintiff has presented this § 301 claim.

Plaintiff instituted both the arbitration proceedings and the present action. Plaintiff, however, is not before this court to request a stay of arbitration, contesting the substantive arbitrability of the issue raised before the arbitrator. *E.g., Local 103, International Union of Electrical Workers v. RCA Corp.*, 516 F.2d 1336 (3d Cir. 1975). Nor is plaintiff here seeking to compel arbitration. Rather, plaintiff has brought this § 301 action because Guild Local in the arbitration proceedings instituted by plaintiff reserved objections to substantive arbitrability at this time instead of proceeding through arbitration and then having the issue considered by a court.

Plaintiff's course of action, if followed in all arbitration cases, portends unwarranted and serious disruptions of the arbitral process. There is nothing improper for a party to proceed through arbitration while reserving objections of substantive arbitrability. *See, e.g., Teamsters, Local 249 v. Western Pennsylvania Motor Carriers Association*, 574 F.2d 783, 786 n.2 (3d Cir. 1978), *cert. denied*, 439 U.S. 828 (1979); *Communication Workers v. Western Electric Co.*, 397 F. Supp. 1318, 1325 (N.D. Ga. 1975), *aff'd*, 558 F.2d 816 (5th Cir. 1977); *Humble Oil & Refining Co. v. Local 886*, 271 F. Supp. 281, 284-85 (S.D. N.Y. 1967), *aff'd*, 447 F.2d 229 (2d Cir. 1971). The cited authorities indicate that the matter *sub judice* should have proceeded through arbitration, with necessary judicial determinations made in an action to enforce or overturn the arbitrator's award. Instead, this case is in the anomalous posture of Guild Local requesting an order directing arbitration on the basis of plaintiff's allegations, and plaintiff itself seeking a declaration that the pertinent averments are in fact true. While I have decided to broach the arbitration issue, I do so only with

some reluctance, and do not wish to intimate any approval of the manner in which the question has been presented to the court.[26]

The basic issue before the court is whether the parties are under a duty to arbitrate the alleged breach of the outside activity clause. The standards guiding this determination are clear.

> There is no general duty to submit labor disputes to arbitration. Rather, 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' Thus, whether or not a party is bound to arbitrate a given issue is a matter to be determined 'on the basis of the contract entered into by the parties.'
>
> The question whether the parties have entered into a contract imposing a duty to arbitrate is one that must be decided by the court and not by an arbitrator. In making its determination, however, a court must be ever mindful of the strong national policy favoring arbitration of labor disputes. Arbitration clauses are to be construed broadly, and there is 'a strong presumption favoring arbitrability.' The application of this policy is clearest when a party asserts that a particular type of claim falls outside the scope of an arbitration clause. In such cases,
>
> > '[a]n order to arbitrate the particular grievance should not be denied unless it may be said

---

[26] The positions to be taken by the parties on the question of substantive arbitrability are unclear. Normally, the complaint's allegations are conceded by the defendant on a motion to dismiss. Plaintiff, however, seems to argue that Guild Local must substantiate its objections to substantive arbitrability raised before the arbitrator. While this problem would have some significance if a hearing was necessary, I am satisfied that the questions of substantive arbitrability raised by the plaintiff can be resolved on the face of the collective bargaining agreement.

> with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'

Rochdale Village, Inc. v. Public Service Employees Union, Local 80, 605 F.2d 1290, 1294-95 (2d Cir. 1979) (citations omitted). *Accord, Westinghouse Broadcasting Co. v. Local 804, International Alliance of Theatrical Stage Employees*, —— F.2d ——, slip op. at 5-6 (3d Cir., March 12, 1980); *Teamsters Local 249 v. Western Pennsylvania Motor Carriers Association*, 574 F.2d at 786-87; *United Steelworkers v. Canron, Inc.*, 580 F.2d 77, 82 (3d Cir. 1978); *Controlled Sanitation Corp. v. District 128, International Association of Machinists*, 524 F.2d 1324, 1328 (3d Cir. 1975), *cert. denied*, 424 U.S. 915 (1976).

There are two questions to be decided against the backdrop of the above-stated principles: (1) whether plaintiff had a duty to initiate grievance procedures under the collective bargaining agreement; and (2) if plaintiff had such an obligation, whether this duty continued with respect to conduct occurring after the contract's expiration date but while negotiations were continuing.

Plaintiff contends that the grievance clause of the 1976 collective bargaining agreement permits only union complaints to be asserted before an arbitrator. The first two sections of Article XV, entitled "Grievance Procedure," are indeed employee-oriented. For example, the first section calls upon Guild Local to establish a committee "*to take up* with the publisher of his authorized agent any matter arising from the application of this agreement or affecting the relations of the employes and the Publisher." [Emphasis added] [27]

---

[27] The second section requires the Publisher to meet with the Guild committee within five (5) days after request for such a meeting has been received.

The fact that the first two sections appear to be employee-oriented, however, does not necessarily foreclose recognition of a duty on plaintiff's part to arbitrate "any matter arising from the application of [the] agreement." *See Monongahela Power Co. v. Local 2332 International Brotherhood of Electrical Workers*, 484 F.2d 1209, 1214 (4th Cir. 1973). The third section of Article XV at least raises a question concerning plaintiff's duty to arbitrate, and this ambiguity must be resolved in favor of arbitration. *See Controlled Sanitation Corp. v. District 128, International Association of Machinists*, 524 F.2d 1324, 1329 n.7 (3d Cir. 1975), *cert. denied*, 424 U.S. 915 (1976).

The third section provides:

> 3. Any matter arising from the application of this agreement (except renewal of this agreement) which cannot be settled by the grievance committee shall be referred to a standing committee composed of not more than three (3) representatives of the Guild and not more than three (3) representatives of the Publisher in an effort to adjust such dispute. Any such matter not satisfactorily settled within thirty (30) days of its first consideration may be submitted to final and binding arbitration by either party. Such arbitration shall be conducted pursuant to the voluntary arbitrary [sic] rules of the American Arbitration Association. The cost of such arbitration shall be borne equally by the parties, except that no party shall be obligated to pay any part of the cost of the stenographic transcript without express consent.

The broad language used in this section, "any matter arising from the application of this agreement," evidences an intent that all contractual disputes between the plaintiff and Guild Local, whether employer or employee-oriented, be subject to arbitration. Furthermore,

the fact that the section permits either party to submit an issue to final and binding arbitration is a strong indication that plaintiff may be the grieving party, even though the initial procedures specified in Article XV are not suitable for handling the matter. Nor does the use of the phrase "*may* be submitted to final and binding arbitration" compel a conclusion that plaintiff has no duty to pursue arbitration. As then Judge, now Justice, Blackmun observed in *Bonnot v. Congress of Independent Union Local 14*, 331 F.2d 355, 359 (8th Cir. 1964), "[t]he obvious purpose of the 'may' language is to give an aggrived party the choice between arbitration or the abandonment of its claim. The presence of this or similar language has not prevented the conclusion that a claim, if pressed, is compulsorily subject to arbitration." *Accord, Local 777, International Alliance of Theatrical Stage Employees v. RKO General Inc.*, 546 F.2d 1107, 1116 (2d Cir. 1977); *Yale & Towne Manufacturing Co. v. Local 1717, International Association of Machinists*, 299 F.2d 882 (3d Cir. 1962); *Anheuser Busch, Inc. v. Brewery Drivers, Local 133*, 346 F. Supp. 702, 706 (E.D. Mo. 1972). *Compare Teledyne Wisconsin Motors v. Local 283, UAW*, 530 F.2d 727 (7th Cir. 1976) (compulsory arbitration not indicated where word *may* did not refer explicitly to either party in employee-oriented grievance provision).

In *Controlled Sanitation Corp. v. District 128, supra*, the Court of Appeals for the Third Circuit construed a similarly broad but apparently employee-oriented grievance clause to impose a duty to arbitrate on the company. In that action, a "grievance" was defined expansively to encompass any dispute " 'concerning the effect, interpretation, application, claim of breach or violation of this Agreement, or any other dispute which may arise between the parties.' " 524 F.2d at 1327. The agreement then specified an employee-oriented grievance procedure. Significantly, the contract also contained an

arbitration clause similar to section three of Article XV. This clause provided in pertinent part that "[i]n the event the grievance or dispute is not settled in a manner satisfactory to the grieving party (*union or employer*), . . . the grieving party may proceed . . ." to arbitration. *Id.* (emphasis in original). Finally, the agreement provided that the grievance procedure would be the sole means for settling disputes. The Court of Appeals, after reciting the controlling legal precepts, held in terms apropos here that the grievance procedure did not apply solely to employee complaints:

> [T]here is a presumption in favor of arbitration which should be dispelled only when the agreement explicitly exempts certain conduct from arbitration or when the terms of the agreement read as a whole, *clearly* envision non-arbitrability.
>
> We are aware, of course, that the Company contends that the Agreement delineates a grievance procedure oriented solely to employee grievances. In so doing, it points to the procedures established in Article XIII Sections (A), (B), and (C). In view of the language employed in the contract, however, we cannot accept this argument.
>
> The grievance and arbitration provisions of this contract are unusually broad. Section 1 of Article XIII makes clear that a grievance includes a dispute between the employer and the union involving a claimed breach of contract. Most importantly, Section 2(D) of that article specifically states that the employer may be the grieving party. A fair interpretation of the contract would then indicate that an employer-oriented grievance (*i.e.*, an unsettled dispute) begins with the arbitration process or with Section 2(C). Finally, Section 6 of Article XIII represents a strong statement evidencing the parties' intention that all disputes between the em-

> ployer and the union, regardless of whether either party considers the dispute a material breach of contract, be subject to arbitration. Under these circumstances, the Company bound itself to arbitrate this damage claim.

Id. at 1328-29 (emphasis added). *See also United Steelworkers v. Fort Pitt Steel Casting*, 598 F.2d 1273, 1279 (3d Cir. 1979).

As in *Controlled Sanitation*, the scope of the grievance provision involved here is broad: "*any matter arising from the application of this agreement or affecting the relations of the employes and the Publisher.*" Significantly, as in *Controlled Sanitation*, section 3 of Article XV of the 1976 collective bargaining agreement provides that either the Publisher or Guild Local may submit a matter to arbitration, thus suggesting that plaintiff may be the grieving party. Furthermore, as in *Controlled Sanitation*, if the grievance steps prior to arbitration are employee-oriented, a fair interpretation of the contract would indicate that an employer-oriented grievance begins with arbitration.[28] Finally, as in *Controlled Sanita-*

---

[28] Article XV calls for a three-step grievance process. The first step, a meeting between the Publisher and a Guild committee "within five days after request for such meeting has been received in writing," apparently contemplates an employee-initiated complaint. The second step is a meeting of a standing committee composed of an equal number of Guild Local and employer representatives. Matters that *cannot* be resolved in the first step are referred to this standing committee. This step is similar to section 2(C) of the grievance clause involved in *Controlled Sanitation*, which provided that "[i]f no satisfactory settlement is reached, the Shop Committee shall call in the Business Representative and/or Grand Lodge Representative of the International Association of Machinists and Aerospace Workers who shall meet with the designated Employer official and the Shop Committee. . . ." 524 F.2d at 1327. The Court of Appeals concluded in *Controlled Sanitation* that the grievance provision was susceptible to an interpretation that an employer-oriented grievance began at section 2(C), *id.* at 1329,

tion, the provisions of Article XV clearly distinguish this case from *Affiliated Food Distributors, Inc. v. Local Union No. 229*, 483 F.2d 418 (3d Cir. 1973), *cert. denied*, 415 U.S. 916 (1974), "which involved an agreement of substantially narrower phraseology." [29] *Controlled Sanitation*, 524 F.2d at 1329 n.7. Accordingly, I conclude that the 1976 collective bargaining agreement imposes a duty upon plaintiff to arbitrate "any matter arising from the application of [the] agreement," including an alleged breach of the outside activity clause.

This duty to arbitrate applies with respect to any matter arising during the term of the contract, even though the contract may have expired prior to submission to arbitration. *See Nolde Brothers v. Local 358, Bakery Workers*, 430 U.S. 243, 253 (1977); *Local 589, International Ladies' Garment Workers' Union v. Kellwood Co.*, 592 F.2d 1008, 1011-12 (8th Cir. 1979). As Judge Herman of this district noted in *Fur Dressers Union Local 2F v. DeGeorge*, 462 F. Supp. 890, 894 (M.D. Pa. 1978),

---

and, likewise, it would appear that Article XV could be construed to require employer arbitration commencing at step two, and then proceeding to step three, compulsory arbitration.

[29] The grievance provision in *Affiliated Food Distributors* stated that a grievance "shall be subject to the following procedure," and then provided that any matter unresolved by the company representative and union steward "shall be referred to arbitration. . . ." 483 F.2d at 419. The Court of Appeals considered the mandatory language that a grievance *shall* be submitted to an employee-oriented procedure significant evidence that the parties had not intended to arbitrate employer grievances. By way of contrast, the language of Article XV does not indicate that the initiative must always lie with the employee, as did the grievance provision in *Affiliated Food Distributors*. Furthermore, the fact that *either* party may submit an issue to arbitration under Article XV, as opposed to the language "an issue shall be referred to arbitration," evinces an intent to require employer arbitration.

> [T]he termination of a collective bargaining agreement does not automatically extinguish a party's duty to arbitrate grievances arising under the contract, and such expiration does not terminate the parties' contractual obligation to resolve such a dispute by an arbitral rather than a judicial forum when the dispute arises during the life of the agreement.

Thus, plaintiff's allegation that Guild Local breached the collective bargaining agreement prior to the September 30th termination date concerns a matter that clearly arose under the agreement, and, therefore, is subject to arbitration, even assuming that the contract has now expired. Plaintiff has also alleged, however, that the contract and Guild Local's breach continued beyond September 30, 1978. Generally, this averment would be accepted as true for the purpose of Guild Local's motion and arbitration would be ordered. But plaintiff argues that before it may be relegated to the arbitration forum this court must decide as a matter of substantive arbitrability whether the contract continued in existence beyond that date.[30]

As a general rule, the question of contract termination is a matter for the court rather than the arbitrator. *See UAW v. I. T. & T.*, 508 F.2d 1309, 1313 (8th Cir. 1975).

---

[30] Since plaintiff is obliged to arbitrate matters occurring prior to September 30, 1978, it can obtain a decision as to whether Guild Local's alleged conduct constituted a breach of the outside competitive activity clause and an award of damages without reaching the issue of contract termination. Whether the contract continued beyond September 30th may affect the amount of damages recoverable in arbitration or the scope of injunctive relief, but is not really pertinent to determining whether plaintiff is under a duty to arbitrate the § 301 claim. However, in the interest of disposing of all claims raised by the parties, I have decided to reach the issue of a duty to arbitrate purported breaches occuring after September 30th.

Where, however, "the parties have agreed to submit to arbitration disputes 'of any character,' or simply 'any and all disputes,' all questions, including those regarding termination, will be properly consigned to the arbitrator." *Rochdale Village, Inc. v. Public Service Employees Union, Local 80*, 605 F.2d at 1295.

For example, in *Local 4, International Brotherhood of Electrical Workers v. Radio Thirteen-Eighty Inc.*, 469 F.2d 610 (8th Cir. 1972), the collective bargaining agreement contained a provision that the contract would terminate upon the happening of a stated event.[31] The agreement also provided that either party may submit to arbitration "a dispute, difference, or disagreement between the employer and the Union concerning the interpretation or application of the terms of this Agreement. . . ." The employer resisted the action to compel arbitration concerning the discharge of Union members on the ground that the contract had terminated as a result of the occurrence of the stated event. The district court, however, concluded that the contract was in force on the date of the discharge and directed arbitration. The Court of Appeals for the Eighth Circuit agreed that the question of employment termination was referrable to arbitration, but held that the district court should not have determined whether the collective bargaining agreement had expired. The appellate court, finding that the question of contract existence involved a construction of contract language and was therefore a matter committed to the province of the arbitrator, stated:

---

[31] Section 11.12 of the bargaining agreement provided in pertinent part:

> [I]f at any time during the term of this agreement, the Federal Communication [Commission] awards the present frequency of KWK (1380 kc.) to any one of the present interim operators, . . . such operator *may* assume all of the terms and conditions of this agreement from the time of such award.

Id. at 613 (emphasis added).

> The ambit of the bargaining agreement's procedure is painted broadly, requiring arbitration "In the event of a dispute, difference or disagreement * * * concerning the *interpretation* or *application* of the terms of this Agreement * * *. (emphasis added). Radio, Inc. concedes that this language of the agreement compels arbitration of its claimed right to discharge the engineers on its payroll as of August 15, 1969, if the agreement was then in force. We believe the arbitration clause to be sufficiently broad to encompass the latter question as well, cast in terms of § 11.12's application to or impact upon the duration of the agreement as a whole. The 'awards the present frequency' language in § 11.12 of the agreement somewhat vaguely and ambiguously implies an intended termination of the agreement. Thus, the Board of Arbitration, under its broad delegation of authority, is the appropriate forum for resolving the ambiguity of § 11.12 not only regarding the interpretation of specific terms within the section, but also with regard to whether that section shortened the duration of the agreement.

Id. at 614.

In *Winston-Salem Printing Pressmen Union v. Piedmont Publishing Co.*, 393 F.2d 221 (4th Cir. 1968), the collective bargaining agreement contained a contract duration clause which provided in pertinent part: "this agreement shall continue from November 1 through October 31 from year to year and can be changed only by mutual consent or through negotiations started by written notice. . . . Should either party propose such amendments or a new contract, and an agreement proves impossible, the difference or differences shall be arbitrated. . . ." The agreement also contained an arbitration clause that covered questions concerning "the construction to be placed upon any clause of this agreement. . . ." The

union sought to compel arbitration of an issue raised in contract negotiations, and the district court held in its favor, finding that the collective bargaining agreement continued in existence during negotiations. The Court of Appeals for the Fourth Circuit held that the district court overstepped its bounds by resolving the question of contract existence, stating:

> This particular issue involved an application of the contract which should be determined independently by the arbitrator. The contract specifically provides that 'the construction to be placed upon any clause of this agreement' is to be resolved through the grievance procedure . . ., and we can see no reason why that provision should not govern the construction to be given [the duration clause].

Id. at 228.

Involved in this lawsuit is a similarly open-ended contract duration clause—"[t]he terms of this agreement shall remain in effect during . . . negotiations"—and a broad arbitration clause—"any matter arising from the application of this agreement . . . may be submitted to . . . arbitration." Under these circumstances I believe that the question of contract termination is for the arbitrator.[32] Indeed, to hold otherwise would necessarily involve an interpretation of contractual terms relating to the merits of the dispute, and a decision on a matter that is at the very core of plaintiff's claim. The Supreme Court has admonished, however, that the court must not "become entangled in the construction of the substantive provisions of a labor agreement, even through the back-door of interpreting the arbitration clause when the

---

[32] UMW, District 22 v. Roncco, 314 F.2d 186 (10th Cir. 1963), on which plaintiff relies, did not consider whether the question of contract termination came within the scope of the arbitration clause and, therefore, is inapposite.

alternative is to utilize the services of an arbitrator." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960). *Accord, Local 589, International Ladies' Garment Workers' Union v. Kellwood Co.*, 592 F.2d 1008 (8th Cir. 1979); *New York State Association for Retarded Children, Inc. v. Carey*, 456 F. Supp. 85, 95 (E.D. N.Y. 1978). That alternative is available here and, therefore, the issue of contract existence will be referred to the arbitrator.[33]

This court has the option of retaining jurisdiction pending arbitration, or dismissing the action for failure to state a claim upon which relief may be granted. Although a stay is generally recognized as appropriate, *see, e.g., Bechtel Corp. v. Local 215, Laborers' International Union*, 544 F.2d 1207, 1215 (3d Cir. 1976); *Local 595, International Association of Machinists v. Howe Sound Co.*, 350 F.2d 508, 511 (3d Cir. 1965); *Swartz & Funston, Inc. v. Bricklayers International Union*, 319 F.2d 116, 117 (3d Cir. 1963) (*per curiam*), the circumstances of this case militate for dismissal. *See United Electrical Radio Workers v. Honeywell, Inc.*,

---

[33] UAW v. I. T. & T., *supra*, and Rochdale Village, Inc. v. Public Service Employees Union, Local 80, *supra*, also support the result reached here. In UAW v. I. T. & T., the Court of Appeals for the Eighth Circuit concluded that since there was no indication in the bargaining contract that the parties intended to arbitrate the issue of contract termination, and since the issue rested upon a letter agreement separate from the bargaining agreement, the question of contract termination had to be decided by the court. 508 F.2d at 1314. *See also* Local 988, UAW v. B. & T. Metals Co., 315 F.2d 432 (6th Cir. 1963). In *Rochdale Village*, the Court of Appeals for the Second Circuit found that the question of termination in accordance with the duration clause was arbitrable under a broad arbitration clause, but that the issue of termination by separate agreement must be decided by the court. Thus, both courts recognized that the issue of arbitrability turns upon the breadth of the arbitration clause, and where, as here, the arbitration clause is expansive, contract termination is arbitrable.

522 F.2d 1221 (7th Cir. 1975). First, the § 301 claim against Guild Local is the only cause of action still pending. *Compare Bechtel Corp. v. Local 215, Laborers' International Union, supra,* (stay found appropriate where only one of two issues was referrable to arbitration). Second, Guild Local's motion seeks dismissal rather than a stay. *See General Dynamics Corp. v. Local 5, Industrial Union of Marine Workers,* 469 F.2d 848, 854 (1st Cir. 1972). Third, the issue raised in a subsequent action to enforce or stay the arbitration award would be extremely narrow—whether the award draws its essence from the collective bargaining agreement—and this court will not independently determine whether a breach in fact occurred. Finally, it does not appear that plaintiff will be prejudiced by a dismissal rather than a stay inasmuch as it will be able to invoke this court's jurisdiction once the arbitration process has run its course.[34] Accordingly, an order will be entered dismissing this action.[35]

/s/ William J. Nealon
Chief Judge, Middle District
of Pennsylvania

DATED: June 25th, 1980

---

[34] It should also be noted that if plaintiff prevails in arbitration, it may not need to pursue this action.

[35] This opinion does not intend to convey any opinion on the merits or demerits of the underlying contract dispute.

ORDER

Now, this 25th day of June 1980, in accordance with the accompanying Memorandum this day filed, it is hereby ordered:

(1) Defendants' motion to strike plaintiff's post-argument brief is denied.

(2) Plaintiff's breach of contract claim against Guild International is dismissed for failure to state a claim upon which relief may be granted.

(3) Plaintiff's breach of contract claim against Guild Local is dismissed for failure to exhaust arbitration remedies.

(4) Plaintiff's claim of tortious interference with the performance of a contract is dismissed for want of subject matter jurisdiction.

/s/ William J. Nealon
Chief Judge, Middle District
of Pennsylvania

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 79-1181 Civil

WILKES-BARRE PUBLISHING COMPANY,
Plaintiff

v.

NEWSPAPER GUILD OF WILKES-BARRE, *et al.*,
Defendants

[Filed Jun. 3, 1981]

ORDER

Now, this 3rd day of June 1981, pursuant to the Order of the Court of Appeals, this case is stayed pending arbitration.

/s/ William J. Nealon
Chief Judge, Middle District
of Pennsylvania

SUPREME COURT OF THE UNITED STATES

No. A-114

NEWSPAPER GUILD OF WILKES-BARRE, ETC., ET AL.,
Petitioners

v.

WILKES-BARRE PUBLISHING COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 24, 1981.

/s/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 12th day of August, 1981.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-594

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120; THE NEWSPAPER GUILD, AFL-CIO, CLC; WILKES-BARRE PRINTING PRESSMEN'S AND ASSISTANT'S UNION; WILKES-BARRE STEREOTYPER'S AND ELECTROTYPER'S UNION, LOCAL 139; INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, AFL-CIO; WILKES-BARRE TYPOGRAPHICAL UNION, LOCAL 187; WILKES-BARRE COUNCIL OF NEWSPAPER UNIONS, INC.; BROWN, WILLIAM M.; ORCUTT, JAMES H.; SABATINI, RICHARD V.; MAURER, JOSEPH A., JR.; WALLACE, JOHN J.; LADD, ROBERT; KAPORCH, JAMES; BOOTH, ROBERT,

Petitioners,

v.

WILKES-BARRE PUBLISHING CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT L. BALLOW
KING, BALLOW & LITTLE
First American Center
Nashville, Tennessee 37238
(615) 255-3452
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	
1. The decision below is not a radical or impermissible extension of Section 301; rather, the decision facilitates a legitimate formulation of federal common law principles of labor contract enforcement, authorized by the decisions of this Court and consonant with the policy of the legislation	3
2. The decision below is not in conflict with any decision of another court of appeals	6
3. The Third Circuit's recognition that a claim of tortious interference lies under Section 301 does no violence to the federal statutory scheme of labor relations law; on the contrary, it furthers the federal interest by assuring uniformity in the enforcement of collective bargaining agreements	8
CONCLUSION	11
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: Page

Abrams v. Carrier Corporation, 434 F.2d 1234 (2d Cir. 1970), *cert. denied sub nom. United Steelworkers v. Abrams*, 401 U.S. 1009 (1971) 6, 7
Baker v. Fleet Maintenance, Inc., 409 F.2d 551 (7th Cir. 1969) 7, 8
Bowers v. Ulpiano Casal, Inc., 393 F.2d 421 (1st Cir. 1968) 7, 8
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 10
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) 4
John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 4, 5
Local 174, International Brotherhood of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 9, 10
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 4
Smith v. Evening News Ass'n, 371 U.S. 195 (1962) 4, 5, 9
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 4, 5, 10
William E. Arnold Co. v. Carpenters District Counsel, 417 U.S. 12 (1974) 9

Statutes:

§ 7, National Labor Relations Act, 29 U.S.C. § 157.. 8
§ 8, National Labor Relations Act, 29 U.S.C. § 158.. 8
§ 301, Labor Management Relations Act, 29 U.S.C. § 185 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-594

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120; THE NEWSPAPER GUILD, AFL-CIO, CLC; WILKES-BARRE PRINTING PRESSMEN'S AND ASSISTANT'S UNION; WILKES-BARRE STEREOTYPER'S AND ELECTROTYPER'S UNION, LOCAL 139; INTERNATIONAL PRINTING & GRAPHIC COMMUNICATIONS UNION, AFL-CIO; WILKES-BARRE TYPOGRAPHICAL UNION, LOCAL 187; WILKES-BARRE COUNCIL OF NEWSPAPER UNIONS, INC.; BROWN, WILLIAM M.; ORCUTT, JAMES H.; SABATINI, RICHARD V.; MAURER, JOSEPH A., JR.; WALLACE, JOHN J.; LADD, ROBERT; KAPORCH, JAMES; BOOTH, ROBERT,

Petitioners,

v.

WILKES-BARRE PUBLISHING CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Wilkes-Barre Publishing Company,* respectfully requests that this Court deny the petition for

---

* The listing of respondent's parent and affiliated companies required by Rule 28.1 is set forth as an Appendix hereto.

writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Third Circuit in this case. That decision is reported at 647 F.2d 372.

STATEMENT OF THE CASE

For the most part, petitioners' statement of the case fairly and accurately summarizes the facts and proceedings herein. Therefore, respondent will not undertake to restate the case, but will make two additional points in the interests of accuracy and completeness.

In summarizing the allegations of respondent's complaint filed in the district court, petitioners quote portions of the Third Circuit's opinion. Included within the quoted material is a statement that characterized the third count of respondent's complaint—the tortious interference count—as "a pendent claim under Pennsylvania law." (Pet. 3).[1] This characterization by the Third Circuit was erroneous. That count of the complaint asserted alternate jurisdictional bases for the tortious interference claim; respondent pleaded that jurisdiction over the claim lay either directly under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301"), or under the doctrine of pendent jurisdiction.

Petitioners' statement also fails to adequately divulge the Third Circuit's disposition of the case. This case comes before the Court in a wholly interlocutory posture. The district court dismissed respondent's complaint in its entirety. On appeal, the Third Circuit reversed the dismissal as to all of respondent's claims (except for a breach claim against The Newspaper Guild, AFL-CIO, CLC), and remanded to the district court for further

---

[1] The petition for writ of certiorari will be herein cited as (Pet. ——); the petitioners' appendix will be cited as (Pet. App. ——).

proceedings. Additionally, the Third Circuit directed that all proceedings be stayed pending the completion of pending arbitration, noting that "if the Employer loses before the arbitrator on his breach of contract claim and the award becomes final by enforcement in the district court, the Employer may be collaterally estopped from proceeding against the third parties." (Pet. App. 23a).

REASONS FOR DENYING THE WRIT

1. The decision below is not a radical or impermissible extension of Section 301; rather, the decision facilitates a legitimate formulation of federal common law principles of labor contract enforcement, authorized by the decisions of this Court and consonant with the policy of the legislation.

Petitioners attempt to portray the Third Circuit's decision in this case as outrageous judicial lawmaking in an arena from which the federal courts have been legislatively excluded. They urge that, in allowing respondent to pursue its claim of tortious interference before the district court, the court below extended the jurisdictional boundaries of Section 301.

Petitioners' characterization of the decision below is fundamentally flawed for two reasons. First, it is bottomed on the erroneous premises that Section 301 does nothing more than provide a federal forum for breach of contract claims by and against the parties to collective bargaining agreements, and that nonparties to the contract alleged to have been violated may never be sued under the section. Second, the argument ignores the long-standing mandate of this Court that the federal courts are to formulate a uniform body of substantive federal law to effectuate the policy of Section 301. On both points, the petitioners' contentions flatly controvert the governing principles announced by this Court.

Early on, this Court rejected the notion that Section 301 is merely jurisdictional and not a source of substantive law. On the contrary, it held that the statute "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957). The federal courts were admonished to look beyond the language of the statute in formulating the applicable substantive law.

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy.

Id. at 457 (citations omitted). Several years later, reiterating its admonition that Section 301 "is not to be given a narrow reading," this Court held that the statutory language "between an employer and a labor organization" refers to "contracts," not to "suits." *Smith v. Evening News Ass'n*, 371 U.S. 195, 199-200 (1962). *Accord, Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657 n. 13 (1965). Thus, Section 301 requires only that the action be based on the violation of a contract between an employer and a labor organization, and does not limit the persons who may sue and be sued under the statute to the parties to that contract. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) (Section 301 jurisdiction exists in suit against employer which was not a party to contract sued upon); *see also Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976) ("Sec-

tion 301 contemplates suits by *and against* individual employees as well as between unions and employers.") (emphasis in original).

The foregoing decisions of this Court provide the proper framework for evaluating the decision below. Taken together, those decisions reflect this Court's continuing belief in an overriding Congressional policy favoring a pervasive judicial role in preserving the integrity of collective bargaining agreements. Thus, the federal courts have been charged with the duty of preserving and enforcing rights which have their source in a collective bargaining agreement, notwithstanding that the person seeking to assert such rights (*Smith*) or the person who violates such rights (*John Wiley*) is not a party to the agreement. Recognition that a claim for tortious interference is, in fact, a claim "for violation of" a labor contract cognizable under Section 301 is manifestly consistent with that judicial duty. Moreover, such recognition is entirely appropriate under this Court's mandate in *Lincoln Mills* to absorb, as necessary, state law concepts compatible with the purpose of Section 301.

The Third Circuit has done nothing more here than fulfill its obligation to fashion a remedy that will best effectuate the purposes of Section 301, an obligation of which that court was fully cognizant. (Pet. App. 17a-18a). Nor has the Third Circuit misperceived the purposes of Section 301 or the legal principles which will best effectuate those purposes. The encouragement of collective bargaining, the preservation of the integrity of contractual rights, and the attendant industrial peace and stability were clearly the objectives that prompted the enactment of Section 301. The legislative intent would thus be undermined rather than advanced by nonrecognition of tortious interference claims. Denying a contracting party relief against nonparties, who violate the contract by deliberately destroying the bargained-for

benefits, would severely diminish the value of the contract and do grave damage to the goals of collective bargaining.

Thus the decision below, which petitioners characterize as the exercise of a "far-reaching law making power never before discerned" (Pet. 9), in reality represents a faithful adherance to controlling precedents of this Court, and a logical advancement of the policies underlying Section 301. That decision need not be reviewed in this Court.

2. The decision below is not in conflict with any decision of another court of appeals.

Petitioners also urge as grounds for issuance of the writ a supposed conflict between the Third Circuit's decision herein, on the one hand, and decisions of the Courts of Appeals for the First, Second and Seventh Circuits, on the other. Respondent submits that no genuine conflict exists. The question presented in this case was neither raised nor decided in the cases that petitioners claim are in conflict with the decision below.

Petitioners rely chiefly on *Abrams v. Carrier Corporation*, 434 F.2d 1234 (2d Cir. 1970), *cert. denied sub nom. United Steelworkers v. Abrams*, 401 U.S. 1009 (1971), in which the Second Circuit dismissed certain conspiracy claims as not falling within Section 301 jurisdiction. It is clear from that decision that the court was not presented with a properly pleaded claim of tortious interference with a labor contract, and thus did not analyze whether such a claim is cognizable under Section 301. The complaint in *Abrams* consisted of allegations which were "conclusory, vague, overlapping, and often contradictory." *Id.* at 1239. Although the language of the complaint is not reproduced in the opinion, it is evident that the conspiracy claims contained no suggestion of improper inducement; they merely parroted the earlier

allegations of the complaint.[2] This can hardly be said of respondent's complaint.

Respondent's complaint alleges a breach of a specific contract provision, and charges that certain other individuals and labor organizations engaged in tortious conduct which induced that breach. Thus, petitioners' assertion that the claims dismissed in *Abrams* were substantively "indistinguishable from the claim here" (Pet. 9) is specious. The *Abrams* court simply did not address the issue presented in this case.

The other two cases that supposedly conflict with the decision below [*Baker v. Fleet Maintenance, Inc.*, 409 F.2d 551 (7th Cir. 1969) and *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968)] likewise do not address the question raised by this petition. In neither case was a claim of tortious interference pleaded. Indeed, it was not alleged in either case that the nonparty defendants, against whom Section 301 claims were asserted, took any action to bring about or effect the contract violations pleaded.

Moreover, the dismissals in both *Baker* and *Bowers* seem more nearly addressed to the merits of the claims against the nonparties than to their jurisdictional foundation. Significantly, the court in *Baker* concluded that the district court had erred in dismissing for lack of subject matter jurisdiction, rather than granting summary judgment or dismissing for failure to state a claim. 409 F.2d at 553-54. In *Bowers*, although the court expressed doubt as to whether on the facts of that case jurisdiction existed under Section 301, the real basis for the dismissal

---

[2] The court observed that the "allegation of 'conspiracy' is nothing more than a makeweight which adds nothing to the substance of the allegations against the individual defendants. There was therefore no impropriety on the part of the district court in dismissing such superfluous portions of the pleading." *Id.* at 1254.

was the court's conclusion that the plaintiffs could not prevail on the merits, since the complaint alleged merely that the nonparties knowingly accepted the fruits of a completed contract violation with which they otherwise had no connection. 393 F.2d at 423.

Thus, neither *Baker* nor *Bowers* stands for the blanket proposition that Section 301 jurisdiction will never lie against a nonparty defendant, as urged by petitioners. Fairly read, those cases hold only that a Section 301 action cannot be successfully prosecuted against defendants who are not shown to have any complicity in the contract violation. The cases do not conflict with the holding below that claims against nonparties who are alleged to have actively brought about a contract violation are cognizable under Section 301.

3. The Third Circuit's recognition that a claim of tortious interference lies under Section 301 does no violence to the federal statutory scheme of labor relations law; on the contrary, it furthers the federal interest by assuring uniformity in the enforcement of collective bargaining agreements.

Petitioners contend that the decision below undermines the federal statutory plan relative to labor relations. They urge that the Third Circuit's recognition of the tort of interference with contractual relations as part of the federal common law of labor contract enforcement somehow violates a perceived dichotomy between statutory rights and obligations, whose enforcement is primarily entrusted to the National Labor Relations Board (NLRB), and contractual rights and obligations which may properly be adjudicated in the courts. The argument hinges on the assumption that, in deciding claims of tortious interference, the courts must necessarily inquire into matters regulated by Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157, 158

(hereinafter "the NLRA"). For this reason alone, say the petitioners, claims of tortious interference are off-limits to the federal courts.

This argument is wholly without merit. The spectre which petitioners pose of unwarranted intermeddling by the federal judiciary in areas reserved to the NLRB is contrived. The conduct challenged by respondent, and which the Third Circuit held to be cognizable under Section 301, is the willful inducement, facilitation and participation in the violation of a collective bargaining agreement, irrespective of the means by which that violation was accomplished. Contrary to petitioners' assertion (Pet. 10), to hold that such conduct is actionable under Section 301 does not open the floodgates to claims against nonparties challenging a multitude of possible activities. Under the Third Circuit's decision here, unless the conduct being challenged operates to bring about a violation of a collective bargaining agreement, the claim will not be cognizable under Section 301. The fundamental purpose of Section 301 thus remains intact, and there is no danger that it will be used to frustrate otherwise legitimate activity.

The infirmity in petitioners' position is suggested at once by a review of the authorities urged in its support. Petitioners place chief reliance on this Court's decisions in the area of state law preemption. It is indisputable that this preemption doctrine has no relevance in an action arising under Section 301. *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12, 16 (1974); *Local 174, International Brotherhood of Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962). The fact that conduct challenged in a Section 301 suit may be protected or prohibited by the NLRA does not preclude the federal courts from fulfilling their obligation to formulate a substantive federal common law of labor contracts. *Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962).

Even by analogy, petitioners' preemption analysis has no place in this case. There is no danger here that rules will be formulated which will vary from one jurisdiction to another in their impact on federally guaranteed rights.

The question here is whether the federal courts have jurisdiction to adjudicate rights and obligations which have their source in collective bargaining agreements. The fact that, in so doing, the federal courts may consider activities which also fall within the purview of other statutory provisions certainly does not require a negative answer to that question. *See Local 174, International Brotherhood of Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

In essence, petitioners suggest that the compelling federal interest in furthering the important policies embodied in the NLRA, as amended, can only be advanced by altogether barring the federal courts from addressing disputes which may raise questions as to the scope of the statutory rights of the disputants. Their premise is that Congress left no room for the federal courts to fashion a body of substantive federal law for the enforcement of collective bargaining agreements insofar as nonparties are concerned. (Pet. 9). Such a narrow view of what is in fact a comprehensive and multi-faceted national labor relations scheme is clearly belied by this Court's decisions on the subject since *Lincoln Mills*. (See pp. 4-6 *supra*). Petitioners have lost sight of the fact that federal concerns in advancing the national labor policy are better effectuated by permitting the federal courts to shape a uniform body of federal common law than by prohibiting the courts from entering the arena at all.

The Third Circuit has recognized that the doctrine of tortious interference furthers the purpose underlying the enactment of Section 301—the preservation of the in-

tegrity of the fruits of successful collective bargaining. Thus, the decision below is entirely consonant with the federal statutory scheme of labor relations. Petitioners' claim that certiorari is warranted to prevent violence to that scheme must fail.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. BALLOW
KING, BALLOW & LITTLE
First American Center
Nashville, Tennessee 37238
(615) 255-3452
Counsel for Respondent

APPENDIX

At the time the instant suit was filed, respondent was a Pennsylvania corporation, and a wholly-owned subsidiary of Capital Cities Communications, Inc., of New York. At present, respondent is an unincorporated division of Capital Cities Media, Inc., which is a wholly-owned subsidiary of Capital Cities Communications, Inc. Other operating divisions of Capital Cities Media, Inc. include Fairchild Publications, the Arlington (Tex.) *Citizen-Journal*, and the Belleville (Ill.) *News-Democrat*; Capital Cities Vision, Inc. is a wholly-owned subsidiary of Capital Cities Media, Inc.

The following enterprises are operating divisions of Capital Cities Communications, Inc.: WPVI-TV, Philadelphia; WKBW-TV, Buffalo; KTRK-TV, Houston; WTNH-TV, New Haven; WTVD-TV, Durham-Raleigh; KFSN-TV, Fresno; WPAT AM-FM, Paterson, N.J.; KZLA AM-FM, Los Angeles; WJR AM-FM, Detroit; WBAP AM and KSCS FM, Fort Worth; WKBW AM, Buffalo; WPRO AM-FM, Providence; WROW AM-FM, Albany; Fort Worth (Tex.) *Star-Telegram*; *Albany Democrat-Herald*, Albany, Ore.; *Daily Tidings*, Ashland, Ore.; *Gresham Outlook*, Gresham, Ore.; *Springfield News*, Springfield, Ore.; *Cottage Grove Sentinel*, Cottage Grove, Ore.; *Lebanon Express*, Lebanon, Ore.; *Sandy Post*, Sandy, Ore.; *Stamp Collector* magazine; *Stamp Wholesaler* magazine.

The following companies are subsidiary corporations of Capital Cities Communications, Inc.; where a subsidiary is itself a parent corporation, the name of its subsidiaries are noted parenthetically: Oakland Press Co., Pontiac, Mich.; The Kansas City Star Company, Kansas City, Mo.; Capital Cities of Kansas, Inc. (parent of Pennypower Shopping News, Inc.); Capital Cities of Illinois, Inc. (parent of Professional Press, Inc.); Capital Cities of Connecticut, Inc. (parent of Shore Line News-

papers, Inc.); Capital Cities Properties, Inc.; Capital Cities Cable, Inc.; Capital Cities Cable of Albuquerque, Inc. (parent of Sandoval County Cable Television, Inc.); Capital Cities Cable of Ohio, Inc. (parent of Marks Cablevision of Green, Inc.); Capital Cities Cable of Indiana, Inc. (parent of Satellite Cablevision, Inc.); Coastal Bend Cablevision Corp.; Clear Cablevision, Inc.; Omnicon Cablevision of Illinois, Inc.; Omnicon of Michigan, Inc.; Capital Cities Peninsular Cable, Inc.; Capital Cities Cable of Delaware, Inc. (parent of Cablecom-General, Inc.; Cablecom-General, Inc. is the parent of Cablecom-General of Modesto, Inc., Total Television of Santa Rosa, Inc., Triangle Cable Company, Multi-Channels, Inc., Sooland Cablecom Corp., Cablecom of Kirksville, Inc., Cablecom of Fargo, Inc., Video Independent Theatres, Inc. [parent of Tele Hi Fi, Inc. and Lindsay Theatres, Inc.], Cablecom General of Dyersburg, Inc., Vu More Company of Lufkin, Inc., Mid-Kansas, Inc., Trenton Cable TV, Inc., Cablecom General of Altus, Inc.).

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
DEC 2 1981
CLERK

Nos. 81-594 & 81-791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120, *et al.*,
Petitioners,

v.

WILKES-BARRE PUBLISHING CO.,
Respondent.

WILKES-BARRE PUBLISHING CO.,
Petitioner,

v.

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120, *et al.*,
Respondents.

On Petition and Cross-Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONSE TO THE CROSS-PETITION IN NO. 81-791 AND REPLY TO THE BRIEF IN OPPOSITION IN NO. 81-594

WARREN J. BORISH
MERANZE, KATZ, SPEAR
& WILDERMAN
1200 Lewis Tower Building
15th & Locust Streets
Philadelphia, Pennsylvania

DONALD F. SUGARMAN
MILLER, COHEN, MARTENS
& SUGARMAN, P.C.
2460 First National Building
Detroit, Michigan 48226

DAVID BARR
BARR AND PEER
1899 L Street, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-594 & 81-791

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120, *et al.*,
Petitioner,

v.

WILKES-BARRE PUBLISHING CO.,
Respondent.

WILKES-BARRE PUBLISHING CO.,
Petitioners,

v.

NEWSPAPER GUILD OF WILKES-BARRE, LOCAL 120, *et al.*,
Respondents.

On Petition and Cross-Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONSE TO THE CROSS-PETITION IN NO. 81-791 AND REPLY TO THE BRIEF IN OPPOSITION IN NO. 81-594

---

1. We agree that if the petition for certiorari in No. 81-594 is granted, the cross-petition in No. 81-791 should be granted. Indeed, the second question provides an added reason for plenary review to that stated in the original petition. The cross-petition raises two questions. The first concerns pendent jurisdiction; the second concerns the preemptive effect of the National Labor Relations

Act as amended on state common law claims of tortious interference with contractual relationships. Standing alone, the cross-petition's first question affects only the Employer in this case, for once this Court determines whether § 301 of the Labor Management Relations Act creates a federal cause of action, the existence or nonexistence of the prerequisite for federal jurisdiction—a nonfrivolous federal claim—will be clear. In contrast, the preemption question raises an issue of broad general significance in developing the national labor policy closely linked to the important issue presented in the underlying petition. And since the pendent jurisdiction issue may be viewed as relevant to whether the Court has authority to decide the preemption issue the better course, we believe, is to grant both petitions in their entirety.

It is our position that with very narrow exceptions not relevant here Congress intended the unfair labor practices the legislature wrote in the NLRA as amended by the LMRA to regulate the use of peaceful economic weapons during labor disputes. See the District Court's fully reasoned discussion of this issue, analyzing all of this Court's precedents in point (Pet. App. 52a-62a), which led that court to conclude:

> I believe that [the] cases require preemption where, as here, parties to a labor dispute are charged with tortious interference with the performance of a contract, but are not alleged to have engaged in outrageous or violent conduct. Under these circumstances, judicial application of state tort rules could intrude on matters arguably consigned to the NLRB, or regulate conduct left to be controlled by the free play of economic forces. In either case, there is a significant potential for "frustration of effective implementation of the Act's processes." Accordingly, plaintiff's tortious interference claim will be dismissed for want of subject matter jurisdiction.

The District Court's reasoning is not only faithful to this Court's preemption decisions, it is strong support for the basic point of our petition—that Congress in passing the NLRA and LMRA intended to supplant with federal statutory law enforceable through the NLRB the judge-made common law of tortious interference with contractual relationships. (See Pet. in No. 81-594, pp. 11, 13).

2. The brief in opposition states that we "attempt to portray the Third Circuit's decision in this case as outrageous judicial lawmaking in an arena from which the federal courts have been legislatively excluded." (Br. in Op. p. 3) With the exception of the word "outrageous", which is perhaps a shade too strong, that is our contention. Very simply stated, § 301, its legislative history and this Court's decisions, particularly *Carbon Fuel Co.* v. *Mine Workers*, 444 U.S. 212, and *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, lead to the conclusion that the section does *not* authorize the federal courts to create and impose legal obligations on unions or employers who have *not* assumed those obligations by becoming parties to a contract.

The cases relied on in the brief in opposition are perfectly consistent with that conclusion. *Smith* v. *Evening News*, 371 U.S. 195, concerned a suit by an employee in the position of a third party beneficiary against a *party* to a contract; and, as explained in *Howard Johnson*, 417 U.S. at 264, *Wiley* v. *Livingston*, 376 U.S. 543 concerns situations in which liability rests on "substantial continuity of identity in the work force * * * and [an] express or implied assumption of the agreement to arbitrate".

Thus, as we stated in the petition, nothing Congress or this Court has said or done justifies the Third Circuit's unprecedented use of § 301 to impose obligations on nonparties to a contract. That being so and since that decision if left standing alone is certain to have

the widespread effect of encouraging suits in court of a type Congress did not intend to allow, the petitions for certiorari should be granted in both No. 81-594 and No. 81-791.

Respectfully submitted,

WARREN J. BORISH
MERANZE, KATZ, SPEAR
& WILDERMAN
1200 Lewis Tower Building
15th & Locust Streets
Philadelphia, Pennsylvania

DONALD F. SUGARMAN
MILLER, COHEN, MARTENS
& SUGARMAN, P.C.
2460 First National Building
Detroit, Michigan 48226

DAVID BARR
BARR AND PEER
1899 L Street, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of Record)